58

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BRIAN BEVAN,

Petitioner

v.

LEE COUNTY SO

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

BRIAN BEVAN, *ATTORNEY PRO SE,* 1200 Masanabo Lane
Fort Myers, FL 33919, 239-939-2400

QUESTIONS PRESENTED

I. Did the seizure of Petitioners' mobile home violate the Supreme Court of the United States holding of *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992) and the 4th Amendment to the United States Constitution.

II. Did the lower Court's Order violate the Supreme Court of the United States holding of *United States v. Olano,* 507 U.S. 725 (1993) when an alternate juror not only deliberated in the jury room but also became the foreperson of the jury.

III. Did the lower Court err when it ruled that the Petitioner had sued the Respondent Corporations based on a claim of respondeat superior or vicarious liability, when the Petitioner had actually sued the Respondent Corporations in **NEGLIGENCE.**

CERTIFICATE OF INTERESTED PARTIES

The undersigned attorney pro se certifies that the following listed parties have an interest in the outcome of the case.

BRIAN BEVAN
PETITIONER

THE LEE COUNTY SHERIFFS OFFICE
RESPONDENT

RICHARD COWART
RESPONDENT

CLAUDIA COWART
RESPONDENT

JACKIE COWART
RESPONDENT

KENNETH ERNE
RESPONDENT

SGT. BRAD HAMILTON
RESPONDENT

ROSS DI PASQUALE
RESPONDENT

HARVEY HUDNALL
RESPONDENT

JOHN MCDOUGAL
RESPONDENT

MARK DURLING
RESPONDENT

FRED BOND
RESPONDENT

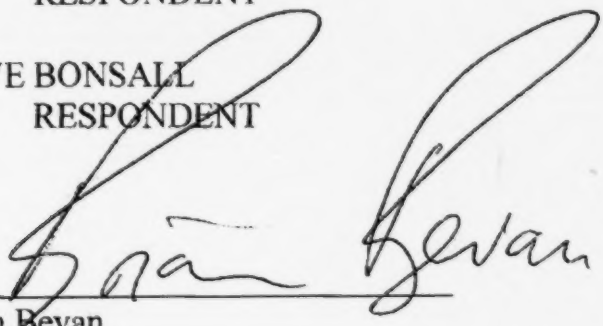
CHICAGO TITLE INSURANCE COMPANY
RESPONDENT'S INSURANCE COMPANY

FIDELITY NATIONAL FINANCIAL
PETITIONER'S AND RESPONDENT'S
INSURANCE COMPANY

SOUTHWEST UTILITY SYSTEMS, INC.
RESPONDENT

MIKE SCOTT
RESPONDENT

DAVE BONSALL
RESPONDENT



Brian Bevan
Attorney Pro Se

TABLE OF CONTENTS

Questions Presented
i.

Certificate of Interested Parties
ii.

Table of Contents
iv.

Table of Authorities
v.

Opinions Below
1

Statement of Jurisdiction
2

Statement of the Case
3

Summary of the Argument
6

Argument and Authorities
7

Conclusion
26

TABLE OF AUTHORITIES

Cases:

Eickmeyer v. Dunkin Donuts of America, 507 So.2d 1193 (Fla. 3rd D.C.A. 1987). 24

Goldschmidt v. Holman, 571 So.2d 422, 424 n.5 (Fla. 1990).
26

McCottrell v. Chicago, 481 NE 2d 1058 (1985).
25

Soldal v. Cook County, Ill., 506 U.S. 56 (1992).
6, 7, 8, 9, 10, 11, 13, 20

Smith v. Raparot, 225 A2d 666 (1967).
25

SMS Trucking Co. v. Midland Vet. Inc., 185 NW 2d 667 (1971)
25

United States v. Olano, 507 U.S. 725 (1993).
21, 22, 23

Rules:

Fed.R.Crim.Proc. Rule 24(c)(3).
21

Treatises:

53 Am. Jur. 2d, Master and Servant §§ 576-579
25

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is not reported in the Federal Reporter. Slip Copy, 2007 WL 30039(C.A. 11 (Fla.)).

The report and recommendation to the United States District Court dated February 23, 2005 appears at Appendix B to the petition and is not reported in the Federal Reporter.

The opinion and order of the United States District Court dated September 13th, 2005 appears at Appendix C to the petition and is not reported in the Federal Reporter.

The opinion and order of the United States District Court dated September 19th, 2005 appears at Appendix D to the petition and is not reported in the Federal Reporter.

The opinion and order of the United States District Court dated October 18th, 2005 appears at Appendix E to the petition and is not reported in the Federal Reporter.

The opinion and order of the United States District Court dated February 14th, 2006 appears at Appendix F to the petition and is not reported in the Federal Reporter.

The opinion and order of the United States District Court dated March 30th, 2006 appears at Appendix G to the petition and is not reported in the Federal Reporter.

The opinion and order of the United States District Court dated May 5th, 2006 appears at Appendix H to the petition and is not reported in the Federal Reporter.

The opinion and order of the United States District Court dated August 9th, 2006 appears at Appendix I to the petition and is not reported in the Federal Reporter.

STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction over this case in accordance with the 4th Amendment, 5th Amendment and the 14th Amendment to the United States Constitution. The date on which the United States

Appellate Court for the Eleventh Circuit decided my case was on January 5, 2007. Brian Bevan petitions this Court from the denial of the rehearing en banc of the United States Appellate Court for the Eleventh Circuit dated March 9, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Petitioner, Brian Bevan, purchased a home and easement on a **private lane** (Document 186) located at 1200 Masanabo Lane, Fort Myers, Florida 33919 on or about the year 1981. On or about August 31, 1999, the Respondents descended upon the Petitioner's easement, a private easement for driveway and roadway purposes that **only** the Petitioner had the right to use; the Respondent's Cowarts did not possess the right to use the Driveway/Roadway. The Respondents used men armed with machetes, chainsaws, bulldozers, and dumptrucks to destroy Brian Bevan's gate, mailbox, fence, citrus trees, rare tropical plants and to seize his house trailer and all of his personal effects stored in his house trailer. Numerous members of the Lee County Sheriff's Department were

present to prevent the Petitioner from stopping the destruction and seizure of his personal property. The Sheriff's Department did not advise the Petitioner of the impending home invasion. The Law Enforcement Respondent's threatened the Petitioner and his family with threats of arrest if they attempted to stop the destruction and seizure of Petitioners' property. Respondent Richard Cowart threatened Petitioner and his family with violence by wielding a 30" machete within inches of their presence. Respondents Richard Cowart and Claudia Cowart, through their jointly owned company Southwest Utility Systems, Inc., used their employees armed with chainsaws and bulldozers to threaten Petitioner and his family with violence. The threats, destruction and seizure of Petitioners' mobile home and its' contents were videotaped by both the Petitioner and the Law Enforcement Respondents and were used in evidence by the Petitioner. (Document #148).

The members of the Lee County Sheriff's Department ordered Chuck's Whiskey Creek Service to

tow Petitioner's mobile home, (Document 225) housing Brian Bevan's effects, from his home on Masanabo Lane where it had been located for some twenty (20) years. It should be noted that Respondents Claudia Cowart and her now ex-husband Richard Cowart lived on another street, called Logan Lane, with a separate entrance on Logan Lane to their home. The Respondents Richard Cowart and Claudia Cowart **falsely** claimed that they had a court order to allow the destruction and seizure of Appellants' property. Lee County Sheriff Commander Kenneth Erne and Sergeant Ross Di Pasquale gave fraudulent affidavits that they had seen the Court Order to allow the seizure and destruction of the Petitioner's personal property. However, the District Court Judge Steele ruled that no order existed. (Document 264, ¶ 46).

Under direct examination, Respondent Richard Cowart admitted that he had **no court order** for the destruction and seizure of Brian Bevan's property on Masanabo Lane. (R. at 230). Respondent Richard Cowart admitted that he had **no court order to remove any encumbrances on Masanabo Lane.** (R. at 230).

Respondent, Richard Cowart freely admitted to the fact that he **seized** Appellant's mobile home and it's contents. (R. at 286). The non-existant Court order was the basis for the home invasion of Petitioner's private driveway and the seizure of his personal property.

The District Court ruled that "the seizure of the trailer violated the Fourth Amendment." (Document 264, ¶ 47). The Law Enforcement Respondents, the Respondents Richard Cowart and Claudia Cowart and Southwest Utility Systems Inc. violated the holding of *Soldal.*

SUMMARY OF THE ARGUMENT

The Respondents and the jury decision violated the Supreme Court of the United States holding of *Soldal v. Cook County, Ill.,* 506 U.S. 56 (1992).

The Judgment of the District Court violated the Supreme Court of the United States holding of *United States v. Olano,* 507 U.S. 725 (1993) as an alternate juror not only deliberated in the jury room but also became the foreperson of the jury.

The lower Court erred when it ruled that the Petitioner had sued the Respondent Corporations based on a claim of respondeat superior or vicarious liability, when the Petitioner had actually sued the Respondent Corporations in **NEGLIGENCE.**

ARGUMENT

I. Did the seizure of Petitioners' mobile home violate the Supreme Court of the United States holding of *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992) and the 4th Amendment to the United States Constitution.

The facts in this case are remarkably similar to the events in *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992). The *Soldal* Court held that a "seizure" of property...occurs when "there is some meaningful interference with an individual's possessory interests in that property." *Id.*, at 61. The Supreme Court opined that "plain view" seizures have been scrupulously subjected to Fourth Amendment inquiry. **Thus, in the absence of consent or a warrant permitting the seizure of the items in question, such seizures can be justified only if they meet the probable-cause standard, and if they are unaccompanied by unlawful trespass. *Id.*, at**

66. That is because, the absence of a privacy interest notwithstanding, "[a] seizure of the article…would obviously invade the owner's possessory interest." *Id.*, at 66. The plain view doctrine "merely reflects an application of the Fourth Amendment's central requirement of reasonableness to the law governing seizures of property." *Id.*, at 66. The Court went on to state "what is evident from our precedents-that the Amendment's protection applies in the civil context as well." *Id.*, at 67. Whatever its proper reading, we reaffirm today our basic understanding that the protection against unreasonable searches and seizures fully applies in the civil context. *Id.*, at 67.

The Supreme Court in *Soldal* stated "But our cases are to the contrary and hold that seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place. *Id.*, at 68. "More generally, an officer who happens to come across an individual's property in a public area could seize it only if Fourth Amendment standards are satisfied-for example, if the items are

evidence of a crime or contraband." *Id.*, at 68. The *Soldal* Court stated "For the plain-view cases clearly state that, notwithstanding the absence of any interference with privacy, seizures of effects that are not authorized by a warrant are reasonable only because there is probable cause to associate the property with criminal activity." *Id.*,at 69.

The District Court stated:

"For summary judgment purposes, the Court does not credit the portions of the deputies' affidavits stating there was a court order authorizing the Cowarts to destroy and/or remove Bevan's property. Plaintiff has filed affidavits which assert that no such court order was ever issued by a judge, and the record supports plaintiff on this point. No defendant has produced a court order which authorized the Cowarts to remove or destroy the personal property. The Order Dissolving Temporary Restraining Order clearly does not so provide, and no reasonable officer who read that order could have concluded that a

court had authorized the Cowarts' conduct."

(Document 264, ¶ 46).

The Distict Court went on to state the following:

"The Court finds that the Sheriff's instruction to Fundermark to remove the trailer, in the absence of an authorizing court order, legal process, or an applicable exception to the warrant requirement, was unreasonable under the circumstances and therefore the seizure of the trailer violated the Fourth Amendment." (Document 264, ¶ 47).

Respondent Richard Cowart violated the holding of *Soldal*. Under direct examination, Respondent Richard Cowart admitted that he had **no court order** for the destruction and seizure of Brian Bevan's property on Masanabo Lane. (R. at 230). Respondent Richard Cowart admitted that he had **no court order to remove any encumbrances on Masanabo Lane.** (R. at 230). Respondent, Richard Cowart freely admitted to the fact that he **seized** Petitioner's mobile home and it's contents when he testified in Federal Court:

Q. So it was you that towed my trailer from there. (R. at 286).

A. That is correct. (R. at 286).

Q. With its contents. (R. at 286).

A. I assume so. Whatever was inside of it went with the trailer; yes, sir. (R. at 286).

Q. You seized it. (R. at 286).

A. I hooked onto it with a piece of equipment, and hauled it out to the end of my property, so that the wrecker could load it on. (R. at 286).

The United States Court of Appeals for the Eleventh Circuit erred when it stated that *Soldal* did not apply because the mobile home was moved from private property onto Masanabo Lane by Richard Cowart where the tow truck operator Chuck's Whiskey Creek Service then towed it away.

The Sheriff's office contacted (Document 225) a hauling company **before** the trailer had left Petitioners' private property. The Law Enforcement Respondents left the trailer sitting on a grass verge alongside of Petitioner's private easement, on Masanabo Lane, a

private lane, (Document 186) where there was **no** right of way that could possibly be blocked. (R. at 342, 343). Deputy Hudnall testified: "But I saw the trailer sitting there…on the side of the road…down on Masanabo Lane. It wasn't on the road, it was over on the…on the grass area. Inside that gated area."

The Eleventh Circuit stated in error that Masanabo Lane was a public street, when in fact it is a private lane that is owned by the Petitioner, Brian Bevan, and his five neighbors that live on Masanabo. Masanabo Lane is not owned by any of the Respondents.

The Eleventh Circuit also erred by stating that the Law Enforcement Respondents did not participate in the removal. In Document 225, the Lee County Sheriff's Office dispatch clearly shows that the Respondents from the Lee County Sheriff's Office called Chuck's Whiskey Creek Service at 11401 McGregor Blvd on 08/31/99 with the time of 14:42 to 1200 Masanabo Lane with signal description "PRIVATE PROPERTY TOW" with reference to signal 70 of WH/GRN MALLRD TRAVEL TRAILOR FL X28 AE820S; COMPL ADV **SW**

UTILITIES REQ VEH BE TOWED OFF THEIR PROPERTY. (Document 225).

Petitioner's case is also similar to *Soldal* in that the Law Enforcement officers prevented the Petitioner from using reasonable force to protect his personal property from a seizure that the officers knew was illegal. *Soldal v. Cook County, Ill.,* 506 U.S. 56 (1992). Deputy Hudnall (R. at 349): "If anybody had interfered with the operation that we were there for, anybody could have been arrested; yes." Petitioner: "My wife? My daughter? Myself?" Deputy Hudnall: "Yes."

Respondent Richard Cowart testified that he had a quit claim deed to property on Masanabo Lane. (R. at 240). The Respondent Richard Cowart read to the Court Exhibit 2 that stated that the state court had not determined the physical location of Respondents' quit claim deed. (R. at 248). The Respondent Richard Cowart admitted that he did not know if any of his employees entered Brian Bevan's mobile home or if the door was locked or unlocked. (R. at 268). The Petitioner, Pro Se, showed the Respondent Richard

Cowart Exhibit 8 and Richard Cowart was unable to state whether the underground state ditch was located under the trailer at the time of the seizure. (R. at 270). The Respondent Richard Cowart admitted that he was carrying a machete during the destruction and seizure of Petitioners' property. (R. at 278). Respondent Richard Cowart admitted that the machete was thirty (30) inches long and that he would allow anybody to swing a machete in the presence of his children. (R. at 278).

The Petitioner Brian Bevan submitted a notarized Affidavit to the District Court that stated:

"Most of the property claimed by Claudia Cowart and Richard Cowart in a quit claim deed is actually owned by the State of Florida according to surveyors that I have employed. The State of Florida has allowed Brian Bevan to use State Land on Masanabo Lane since approximately 1980 for the purposes of storing a trailer, installing a federal mailbox, building a gate and fence and allowing him to grow and cultivate rare plants and trees. The Defendants had no right to destroy my property on State Land." (Document #151).

The district court in its Order dated September 13th, 2005 (Doc. #264) stated: "The **Cowarts** caused an attorney to send the ten-day letter to Bevan and arranged for the self-help ejection of the trailer and gate from the Property and easement utilizing their own personnel. The **Cowarts** called the Sheriff's Office and asked deputies to come to the scene to stand by and keep the peace. (Document #264, Page 15).

The district court in its Order dated September 13th, 2005 (Doc. #264) stated: "The **Cowarts** have filed Affidavits stating that **they** made the decision to remove the items upon advice of counsel. (Document #264, Page 17).

The district court in its Order dated September 13th, 2005 (Doc. #264) stated: "Additionally, **Sgt. Hamilton,** surrounded by plaintiff and **Cowart's employees,** (employees of Southwest Utility Systems, Inc. **a company owned solely by Claudia Cowart and Richard Cowart) is shown telling Bevan** that either Bevan removes the mailbox from the gate or

"we'll (the Sheriff's Deputies) remove it and place the mailbox on your property. (Doc. #148, Time: 4:21-4:40)." (Document #264, Page 17).

The district court in its Order dated September 13th, 2005 (Doc. #264) stated: "An officer also told plaintiff he should move his vehicle so the **Cowarts** would not destroy or tow it." (Document #264, Page 20).

The district court in its Order dated September 13th, 2005 (Doc. #264) stated: "The Affidavit of Sgt. Brad Hamilton (Doc. #142, Exhibit 1) states that he and the other officers were called by the **Cowarts** to the Property, and the **Cowarts** "explained that **they** had a court order permitting **them** to reclaim **their** land and remove all encumbrances, including a trailer, a fence, a mailbox and citrus trees." (Document #264, Page 19).

HOWEVER: The district court in its Order dated September 13th, 2005 (Doc. #264) stated: "For summary judgment purposes, the Court does not credit the portions of the deputies affidavits

stating there was a court order authorizing the Cowarts to destroy and/or remove Bevan's property. Plaintiff has filed affidavits which assert that no such court order was ever issued by any judge, and the record supports plaintiff on this point. No defendant has produced a court order which authorized the Cowarts to remove or destroy the personal property. The Order Dissolving Temporary Restraining Order clearly does not so provide, and no reasonable officer who read that order could have concluded that a court had authorized the Cowarts' conduct. (Document #264, Page 26).

The district court went on to state:

The Court finds that the Sheriff's instruction to Fundermark to remove the trailer, in the absence of an authorizing court order, legal process, or an applicable exception to the warrant requirement, was unreasonable under the circumstances and therefore the seizure of the

trailer violated the Fourth Amendment.

(Document 264, ¶ 47).

Claudia Cowart was the **President and half owner** of Southwest Utility Systems, Inc. on August 31, 1999, and **it was Southwest Utility Systems, Inc.'s employees and equipment that caused the destruction and seizure of Plaintiff's property. (Doc. #349, Item 21).**

Richard Cowart's testimony at trial places Claudia Cowart at a planning meeting to destroy and seize Brian Bevan's property with the Law Enforcement Appellees.

The following is Richard Cowart's testimony:

A. As I recall, there was only one meeting, and I believe it took place at 1204 Logan Lane.

Q. Is that your – or was that your home address?

A. It was my home address; yes, sir.

Q. So… is it your testimony that these people gathered at your house to discuss me?

A. That is correct.

Q. And what could you possibly do to me? Or have done to me?

A. I don't recall exactly what we were discussing. It was mainly with the Sheriff's Department.

Q. Wasn't there approximately 20 neighbors that you rounded up?

A. I don't recall the exact number.

Q. Was your wife there?

A. Yes, sir; she was.

Q. Your first wife, Claudia.

A. That is correct.

Q. How about the second wife?

A. I have no idea.

Q. But she lived in the house with you.

A. There again, yes, she did, at the time.

(R. 251-252).

Respondents Richard Cowart and Claudia Cowart were not just accomplices of the Law Enforcement Respondents in this illegal seizure; they were in actuality Principal Perpetrators and they should be found liable for

the unjustifiable and illegal seizure of the Petitioner's mobile home and contents, that violated the holding of the Supreme Court of the United States in *Soldal.*

The ramifications of the lower court's decision, if upheld, would be a total disaster on the American economy. Not only mobile homes will be seized without a warrant, but businesses, homes, farms, stocks and bonds. Foreign investors will pull their money out of the New York Stock Exchange if they know that their stocks can be seized by the government without a warrant or court order. A complete lack of faith in the U.S. dollar will occur because no one will do business in American dollars if they know that their bank accounts will be seized without a warrant or court order.

In Communist China, the Chinese government has written into their Constitution that no one's property will be seized by the government. The Chinese government did this because they know if businessmen have confidence that their factories, machines and stocks will not be seized, then foreign investors will put their money into China. So as it stands now, a communist Chinese

person has more rights than an American. The lower court's ruling is manifestly unjust, unconstitutional, and un-American. If America is to remain the global leader for business, then this writ of certiorari must be granted.

II. Did the lower Court's Order violate the Supreme Court of the United States holding of *United States v. Olano,* 507 U.S. 725 (1993) when an alternate juror not only deliberated in the jury room but also became the foreperson of the jury.

Federal Rules of **Criminal** Procedure **Rule 24 (c)(3)** refers to retaining Alternate Jurors and states: **"The Court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged."** *Fed.R.Crim.Proc. Rule 24(c)(3).* **The Supreme Court** in *United States v. Olano,* 507 U.S. 725 (1993), held that: "The question, then, is whether the **instant violation of Rule 24(c)** prejudiced respondents, either specifically or presumptively. In theory, the presence of alternate jurors during jury deliberations might prejudice a defendant in two different ways: either because the alternates actually participated in the deliberations, verbally or through

'body language;' or because the alternates' presence exerted a 'chilling' effect on the regular jurors. *Id.* at 739. Conversely, 'if the alternate in fact abided by the court's instructions to remain orally silent and not to otherwise indicate his views or attitude...and if the presence of the alternate did not operate as a restraint upon the regular jurors' freedom of expression and action, we see little substantive difference between the presence of [the alternate] and the presence in the juryroom of an unexamined book which had not been admitted into evidence. *Id.* at 739.

In the present case the alternate juror, Astrid Soria, not only deliberated with the jury after being dismissed but became the foreperson and returned a verdict in favor of Respondent Richard Cowart within twenty-six (26) minutes. At 12:04 P.M. Court was recessed, at 12:30 P.M. Court was reconvened with a verdict. Astrid Soria was no unexamined book in the juryroom. To the contrary, she greatly influenced the other six jurors in violation of Federal Rule of **Criminal** Procedure Rule 24(c)(3) which states: "The Court must

ensure that a retained alternate does not discuss the case with anyone, until that alternate replaces a juror or is discharged;" and in violation of *United States v. Olano,* 507 U.S. 725 (1993). The following is a reflection of the record:

The Court: So that makes Ms. Glendaniel six. Let's go through this. Mr. Troutman is Number 1, Mr. Meyer is 2, Ms. Bryant is Number 3, Miss Stewart is Number 4, Miss Connor is Number 5, and Ms. Glendaniel is Number 6. (R. at 38).

The Court: And then I'm going to select two alternates. (R. at 38).

The Court: So Miss Hanko is Number 7, Miss Soria is Number 8. (R. at 40).

On February 16th, 2006 the record reflects the following:

The Court: Mrs. Soria, do I gather you are the foreperson? (R. at 2).

Juror Soria: I am. (R. at 2).

The Court: And Mrs. Soria, are these your verdicts? (R. at 515).

Juror Soria: Yes. (R. at 515).

The Third District Court of Appeal for Florida held that when an alternate juror is present during deliberations that it is reversible error, even in civil cases. *Eickmeyer v. Dunkin Donuts of America,* 507 So.2d 1193 (Fla. 3rd D.C.A. 1987). The Court went on to state that they rejected the contention that the plaintiff waived reliance on the error by failing to file a post-trial memorandum or motion for new trial. "As a general rule, all that is required-even in a non-'fundamental' situation-to preserve error below is to give the trial court a fair opportunity to rule on the issue." When the plaintiff in *Dunkin* asserted her position by motion for mistrial when the error became apparent on the jury's return, there was no requirement of a separate motion for new trial. *Id.*

The alternate juror, Astrid Soria, deliberations in the present case was fundamental error and requires a reversal and remand with orders for a new trial.

III. Did the lower Court err when it ruled that the Petitioner had sued the Respondent Corporations based on a claim of respondeat superior or vicarious liability, when the Petitioner had actually sued the Respondent Corporations in **NEGLIGENCE.**

The Petitioner, Brian Bevan, had actually sued the Respondent Corporations and it's employees under the theory of **NEGLIGENCE** not respondeat superior or vicarious liability. A person who was injured or sustained property damage due to negligence by an employee may be able to seek a remedy through various actions other than a respondeat superior action against the employer. An obvious possibility may be to bring a negligence action directly against the negligent employee. Both the employer and the employee can generally be joined as defendants in an action based on an employee's negligence within the scope of his or her employment, and each may be held jointly and severally liable. *See, e.g., McCottrell v. Chicago,* 481 NE 2d 1058 (1985); *SMS Trucking Co. v. Midland Vet. Inc.,* 185 NW 2d 667 (1971); *Smith v. Raparot*, 225 A2d 666 (1967); 53 Am. Jur. 2d, Master and Servant §§ 576-579.

The essential elements of an actual agency relationship are "(1) acknowledgement by the principal that the agent will act for him, (2) the agent's acceptance of the undertaking, and (3) control by the principal over

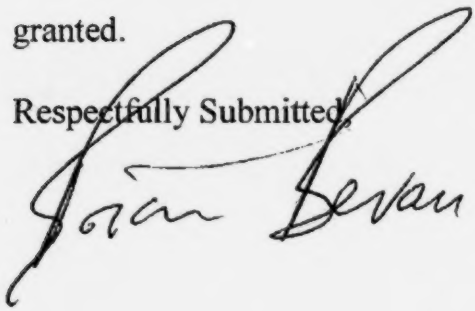
the actions of the agent." *Goldschmidt v. Holman,* 571 So.2d 422, 424 n.5 (Fla. 1990).

In the case at bar, Richard Cowart and Claudia Cowart were acting for the principal, Southwest Utility Systems, when they requested the Lee County Sheriff's Office to tow the Petitioners' trailer. In Document 225, the Lee County Sheriff's Office dispatch clearly shows that the Respondents from the Lee County Sheriff's Office called Chuck's Whiskey Creek Service at 11401 McGregor Blvd on 08/31/99 with the time of 14:42 to 1200 Masanabo Lane with signal description "PRIVATE PROPERTY TOW" with reference to signal 70 of WH/GRN MALLRD TRAVEL TRAILOR FL X28 AE820S; COMPL ADV **SW UTILITIES REQ VEH BE TOWED OFF THEIR PROPERTY.** (Document 225). The agent's accepted the undertaking of the destruction and seizure of the Petitioner's property. Finally, Southwest Utility Systems had control over it's employees that seized the Petitioners' property.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



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Date: June 7th 2007

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT U.S. COURT OF APPEALS

ELEVENTH CIRCUIT
JAN 5, 2007
THOMAS K. KAHN
CLERK

No. 06-12067
Non-Argument Calendar

D.C. Docket No. 03-00500-CV-FTM-29-SPC

BRIAN BEVAN,

versus

LEE COUNTY SO,
KENNETH ERNE, individually,
MARK DURLING, individually,
HARVEY HUDNALL, individually,
FRED BOND, individually,
RICHARD TRAVIS CO WART, individually,
CLAUDIA COWART, individually,
JACKIE COWART, individually,
SOUTHWEST UTILITY SYSTEMS, INC.,
a Florida Corporation, et al.,
Defendants-Appellees,

ROD SHOAP, in his individual capacity and in his official capacity as Sheriff of Lee County,

Appeal from the United States District Court
for the Middle District of Florida

(January 5, 2 007)

Before ANDERSON, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

Brian Bevan, proceeding pro Se, appeals the district court's final orders and the jury verdict in his suit against (1) Richard, Claudia, and Jackie Cowart; (2) Southwest Utilities Systems, Inc. ("Southwest") and (3) nine deputies and the Sheriff of the Lee County's Sheriff's Office ("LCSO"). Bevan's complaint alleged a violation of his Fourth Amendment rights under 42 U.S.C. § 1983 based on the removal of his trailer, mailbox, fence, gate, and tropical trees from disputed land. The district court entered summary judgment on his claims against Claudia Cowart, Jackie Cowart, and Southwest. It dismissed his claims against the law enforcement defendants for failure to comply with

discover orders. Ultimately, Bevan tried only the Fourth Amendment and assault claims against Richard Cowart. The jury found in favor of Cowart on both claims.

On appeal, Bevan argues that (1) the magistrate judge erred by not recusing herself because she was biased. He also argues that the district court erred by

adopting the extreme sanction of dismissing his claims against the law enforcement officers with prejudice, when his failure to comply with discovery requests was not willful and there was no longer a danger of prejudice. Furthermore, he contends that (3) the district court erred in granting summary judgment on the claims against Jackie Cowart, Claudia Cowart, Southwest, and the law enforcement defendants. He argues that (4) there was sufficient evidence to support a finding that Richard Cowart and Claudia Cowart violated the Fourth

Amendment and *(5)* the district court committed plain error by not instructing the jury as to the meaning of "seizure." Finally, Bevan argues that (6) the court erred in allowing the jury alternate and a juror whom taught criminal justice participate in the deliberations and verdict.

I.

Bevan first argues that the magistrate judge erred in not recusing herself because (1) her rulings showed a pattern of harassment; and (2) she was biased because "she knew about his intention to reveal her criminal activities." We review the denial of a motion for recusal for abuse of discretion. *United States v. Bailey, 175* F.3d 966, 968 (11th Cir. 1999)(per curiam). Under this standard, we affirm a judge's refusal to recuse herself unless we "conclude that the impropriety is clear and one

which would be recognized by all objective, reasonable persons."

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Id. Recusal is necessary when a judge's "impartiality might reasonably be questioned." 28 U.S.C. *455(a).* When a judge's challenged actions "consist of judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel and to witnesses," these actions do not require recusal absent a showing of unequivocal antagonism or the judge's reliance on knowledge acquired outside the proceedings. *Liteky v. United States,* 510U.S.540,556, 1145.Ct. 1147, *1158,* 127L.Ed.2d474(1994).

Here, the magistrate judge did not abuse her discretion by failing to recuse herself because Bevan failed to establish that the magistrate judge had any personal bias. There is no evidence that the magistrate judge knew of his attempts to expose alleged criminal activity, or that such knowledge had any affect on her

rulings. The only challenged actions were recommendations and rulings made in the course of judicial proceedings, and there was nothing in the magistrate judge's report to cause an objective observer to doubt the judge's impartiality. *See United States v. Patti,* 337 F.3d 1317, 1321 (11th Cir. 2003)(explaining the standard of review).

II.

Bevan also appeals the district court's dismissal of his complaint against the law enforcement defendants, arguing that he did not willfully disregard discovery orders and any prejudice that resulted from his failure to comply was cured before

the district court entered its order. The district court has broad discretion to impose sanctions under Fed. R. Civ. P. 37, and we review only for an abuse of discretion. *United States v. Certain Real Property Located at Route*

1, Bryant, Ala, 126 F.3d 1314, 1317 (11th Cir. 1997). Still, the dismissal ofa claim should be used only when "noncompliance with discovery orders is due to willful or bad faith disregard for those orders." *Id.*

Here, the district court did not abuse its discretion in finding Bevan's noncompliance was willful or the result of bad faith. Bevan failed to file responses to interrogatories until after the magistrate judge recommended dismissing his complaint, and even then, the responses were inadequate. Bevan refused to answer basic questions including requests to describe in detail how the April 31, 1999 incident happened, describe in detail each act or omission on the part of the each individual defendant that constituted a violation of his civil rights, and provide the factual basis for his claims. By failing to provide the factual basis for his claims,

Bevan prevented law enforcement defendants from obtaining information essential to preparing their defense.

Bevan's failure to answer was willful given he had access to the necessary information and still failed to timely respond. Although Bevan now claims he was unable to obtain documents necessary to answer due to his former attorney, he

never made such a claim before the magistrate judge recommended dismissal. Furthermore, Bevan admits that the defendants could have gotten their answers by deposing him, demonstrating that he had the needed information.

The court warned Bevan that he would be required to comply with court rules despite his *pro se* status, and Bevan still willfully refused to comply with discovery orders even though he was able to do so. The district court, then, did not abuse its discretion in

dismissing the complaint against the law enforcement defendants.

III.

Next, Bevan challenges the grant of summary judgment in favor of Claudia Cowart, Jackie Cowart, and Southwest. He also challenges the order of summary judgment in favor of the law enforcement officers based on sovereign immunity; however we need not address this claim because the dismissal of the complaint against them was proper under Fed. R. Civ. P. 37. We review grants of summary judgment *de novo. Mercado v. Orlando,* 407 F.3d 1152, 1156 (11th Cir. 2005). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* At this stage, the facts are viewed in the light most favorable to the non-moving party, Bevan. *Id.*

The district court did not err in granting summary judgment to Jackie

Cowart and Claudia Cowart. Bevan produced no evidence that Jackie was involved in Richard Cowart's removal of Bevan's trailer, gate, tropical trees, mailbox, or fence. *See Zatler v. Wainwright,* 802 F.2d 397, 401 (11th Cir. 1986) (holding that a § 1983 claim requires proof of an affirmative causal connection between the defendant's act and the alleged constitutional deprivation). Similarly, he produced no evidence that Claudia was present when Bevan's trailer was removed or that she instructed anyone to remove the trailer. Because Bevan produced no evidence linking Jackie or Claudia to his alleged constitutional deprivation, there was no disputed issue of fact and summary judgment was appropriate.

Because the Robert and Claudia Cowart were joint owners of Southwest and its equipment was used in the

destruction of Bevan's property, Bevan asserted a Fourth Amendment claim against the company based on respondeat superior. The district court properly granted summary judgment on these claims because an employer cannot be held liable under § 1983 for its employees' actions under a theory of respondeat superior or vicarious liability. *Harvey v. Harvey,* 949 F.2d 1127, 1129 (11th Cir. 1992).

Iv.

Bevan argues that the district court erred in not finding Richard and Claudia

Cowart liable under the decision in *Soldal v. Cook County, 506* U.S. *56,* 113 S. Ct. 538, 121 L. Ed. 2d *450* (1992). Given this decision, he argues that there was enough evidence to support a finding in his favor. Because the district court properly granted summary judgment on the claims against Claudia Cowart, we

address this argument only as it pertains to Richard Cowart. The question on review, however, is not whether there was enough evidence to hold Cowart liable, but rather was there enough evidence to support the jury verdict. "We will not second-guess the jury or substitute our judgment for its judgment if its verdict is supported by sufficient evidence." *Gupta v. Florida Bd. Of Regents,* 212 F.3d 571, 582 (11th Cir. 2000). When, as here, the movant has failed to move for a directed verdict at the close of evidence, our review is limited to plain error. *Little v. BankersLife & Cas. Co., 426* F.2d 509, 511 (5th Cir. 1970).

To prevail in his § 1983 claim, Bevan needed to show that he was deprived of a federal right by a person acting under the color of state law. *Griffin v. City of Opa-Locka,* 261 F.3d *1295,* 1303 (11th Cir. 2001). In order for Cowart, a private party, to be considered a "state actor," one of three conditions must be met: (1) the state has

coerced or at least significantly encouraged the action alleged to violate the Constitution (state compulsion test); (2) the private party performed a public function that was traditionally the exclusive prerogative of the state (public

function test); or (3) the state had so far insinuated itself into a position of interdependence with the private party that it was a joint participant in the enterprise (nexus/joint action test). *Rayburn ex rel. Rayburn v. Hogue,* 241 F.3d 1341, 1347 (11th Cir. 2001). The mere presence of officers to keep the peace does not constitute state action. *See Cofield v. Randolph County Comm.,* 90 F.3d 468, 472 (11th Cir. 1996).

Here, the evidence supports that Richard Cowart was not acting under the color of state law when he removed the trailer from the disputed land. The evidence showed that only Cowart and his employees removed chattels from the disputed land. Law enforcement did not

participate in the removal and stated several times that they were present only to keep the peace. The evidence also supported a finding that the Sheriff's Office contacted a hauling company to remove the trailer only after it had left private property and was blocking the right away. Finally, this case is distinguishable from *Soldal.* In *Soldal,* officers prevented Soldad from using reasonable force to protect his home against an eviction the officers knew was illegal. 506 U.S. at 60. Here, Cowart told officers he had a court order allowing him to take action. Thus, the officers were not enabling clearly unlawful actions. Given the evidence, the jury did not plainly err in failing to hold Cowart liable under the Fourth Amendment.

V.

Bevan contends that the district court never instructed the jury on the meaning of "seizure" and erred by not including a reference to *Soldal v. Cook County.*

Bevan raised this issue at trial by requesting the instruction. "We review jury instructions *de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party." *Palmer v. Bd. of Regents of Univ. Sys. of Ga.*, 208 F.3d 969, 973 (11th Cir. 2000).

Bevan's arguments are without merit since the district court explained the term "seizure" after closing arguments and there was no error in its instruction. The court instructed the jury that a seizure occurs when "there is some meaningful interference with an individual's possessory interest in. personal property." The court further explained that a seizure violates the Fourth Amendment only if it is unreasonable under all the facts and circumstances, and the seizure occurred under color of state law. The court noted that "[ajcts of private citizens may be considered to have been done under color of state law where the action of the Sheriff's deputies

constituted more than mere presence to keep the peace, and the defendant acted as a willful participant, in joint activity with the Sheriff's deputies in the unlawful action." The court is not required to reference particular cases and this instruction does not misstate the law or mislead the jury. Thus, we can find no

reversible error in the jury instructions given.

VT.

Finally, Bevan argues that the district court erred in denying his motion for new trial because an alternate juror and a criminal justice teacher participated in jury deliberations and the verdict. We lack the subject matter jurisdiction to consider these claims because a final order was not issued before Bevan made his appeal. We are obligated to inquire into subject-matter jurisdiction whenever it may be lacking. *Chacon-Botero v. United States Att'y Gen.*, 427 F.3d *954,* 956 (11th Cir. 2005)

(per curiam). We review *de novo* whether we have subject-matter jurisdiction. *Brooks v. Ashcroft,* 283 F.3d 1268, 1272 (1 ith Cir. 2002). An appeal from a final judgment brings up for review all preceding non-final orders. *See e.g., Kirklandv. Nat'l Mortgage Network, Inc.,* 884 F.2d 1367, 1370 (11th Cir. 1989). Conversely, an appeal does not bring up for review any final orders that were entered subsequent to the filing of the notice of appeal. *See La Chance v. Duff 's Draft House,* 146 F.3d 832, 838 (11th Cir. 1998). After the district court denied his motion for new trial, Bevan did not file an additional notice of appeal or amend his previous notice. Further he did not file his brief indicating his desire to appeal these issues within 30 days of the district court's order. Accordingly, we lack jurisdiction to consider these claims.

VII.

After careful review of the parties' arguments and the record, we dismiss Bevan's appeal of the district court's denial of his motion for a new trial, and we find no reversible error in the district court's other orders. Furthermore, there was sufficient evidence to support the jury's verdict. Therefore we dismiss in part and affirm in part.'

DISMISSED IN PART, AFFIRMED IN PART.

'Appellant's motion to file an addendum to the record excerpts is granted.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

BRIAN BE VAN,

Plaintiff,

-vs- Case No. 2: 03-cv.-500-FtM-29SPC

ROD SHOAP, individually and in his official capacity as Sheriff of Lee County, Florida, JOHN MCDOUGALL, individually, KENNETH ERNE, MARK DURLING, HARVEY HUDNALL, FRED BOND, DAVE BONSALL, ROSS DI PASQUALE, SERGEANT HAMILTON, RICHARD TRAVIS CO WART, CLAUDIA GADD CO WART, JACKIE COWART, SOUTHWEST UTILITY SYSTEMS, INC., CHUCK FUNDERMARK and CHUCK'S WHISKEY CREEK SERVICE, INC.,

Defendant.
_____/

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT

This matter comes before the Court on the Defendants Rod Shoap, Harvey Hudnall, Fred Bond, Kenneth Erne, David Bonsall, Mark Durling, John McDougall, Brad Hamilton, Ross

Di Pasquale, George Mitar's (hereinafter Law Enforcement Defendants) Motion for Sanctions (Doc. # 229) filed on February 2, 2004.

The Defendants' Rule 37 Motion for Sanctions requests the case be dismissed with prejudice against the Defendants for the Plaintiff's discovery violations. Specifically, the Rule reads in relevant part:

> If a party or an officer, director, or managing agent of a party.. fails (1) to appear before the officer who is to take. [a] deposition, after being served with proper notice, or (2) to serve answers or objections to interrogatories ...or (3) to serve a written response to a request for inspection. .the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

Fed. R. Civ. P. 37(d). The referenced subsection further provides that, where appropriate, a court is authorized to strike pleadings, stay proceedings, dismiss the action or any part thereof, or render ajudgement by default against a disobedient party. Fed. R. Civ. P. 37(b)(2)(C).

Rule 37 confers upon district court judges broad discretion to fashion appropriate sanctions for the violation of discovery orders. Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1366 (11th Cir. 1997) (citing Malauteav. Suzuki Motor Co., 987 F.2d 1536, 1542(11th Cir. 1993) *cert. denied,* 510 U.S. 863, 114 S. Ct. 181, 126 L. Ed. 2d 140 (1993)). However, this discretion is not unbridled. Wouters v. Martin County, 9 F.3d 924, 933 (11th Cir. 1993). Dismissal is an extreme sanction that should only be used as a last resort. Id. The decision to dismiss a claim or enter default judgement is proper only if noncompliance with discovery orders is due to willful or bad faith disregard for thoseorders. Coxv. AmericanCastIronPipeCo., 784F.2d *1546, 1556* (llthCir. 1986). Violation of a discovery order caused by simple negligence, misunderstanding, or inability to comply will not justify a Rule 37 default judgement or dismissal. U.S. v. Certain Real Property Located at Route 1, Bryant Alabama, 126 F.3d 1314, 1317 (11th Cir. 1997).

In this case, the Law Enforcement Defendants cite to specific instances where they had to seek the Courts assistance directing the Plaintiff to comply with discovery requests. In

most cases the Plaintiff has either failed to respond or had to be compelled by the Court to comply. First, the Plaintiff failed to respond to the Court's Order compelling answers to interrogatories (Doc. # 160), issued on December 16, 2004. The Court notes that the original requests for production and interrogatories were propounded on August 6, 2004. The Law Enforcement Defendants state that the Plaintiff has still refused to either answer or object to the interrogatories that were the subject of this Court's Order compelling answers to their interrogatories. The relevant interrogatories included requests for: the names and addresses of witnesses to the incident the Plaintiff intended to call at trial and the information to be provided by those witnesses; the expenses he incurred as a result of any alleged injuries he may have received as a result of the incident; details of any lost compensation as a result of the incident, lists of medical records that he may possess that were a directly incurred as a result of the incident; lists of employers that he had worked for in the last five years; and for the Plaintiff to state a factual basis for the claim that the Plaintiff lost valuable real property. (Doc. # 140 Exhibit A). Much of the information requested

should have been turned over during initial discovery pursuant to Fed. R. Civ. P. 26(a)(1)(A-E) and is necessary for the Law Enforcement Defendants to prepare a proper defense against the Plaintiff's charges.

Additionally, the Plaintiff had to be ordered to provide production request that went straight to the heart of the damages claimed by the Plaintiff including documentation of lost valuable real property, lost income, medical bills incurred as a result of the incident and Plaintiff's claimed emotional distress, and any documentation that would support the Plaintiff's calculation for damages.

Further, the Plaintiff failed to abide by the District Court's Order (Doc. # 214) directing the parties to file a Joint Pretrial Statement by February 2, 2005, or if that deadline was not met then the Parties were directed to meet at the U.S. Courthouse on or before February 21,2005, to prepare and submit a Joint Final Pretrial Statement. Because of the Presidents' Day holiday the date for meeting and submission was extended to February 22, *2005.* The Plaintiff failed to meet with Defendants pursuant to the District Court's Order (Doc. # 214) requiring an in-person meeting to file a Joint

Pretrial Statement. While the District Court's Order relates to matters not involved in this Motion it demonstrates the willful disregard the Plaintiff has shown toward this Court and the other litigants involved in this case.

After reviewing the record and the information that the Plaintiff has failed to provide during discovery or in response to this Court's Orders, the Court believes the Defendants would suffer extreme prejudice should they have to proceed to trial under the current circumstances. This Plaintiff has been repeatedly warned by the Court that he must comply with the Federal and Local Rules or face sanctions. His deliberate and repeated transgressions against this Court's Orders rises to the necessary level of willful and bad faith disregard of this Court's Orders and the the extreme sanction requested is therefore justified. Thus, the Court respectfully recommends that the Law Enforcement Defendants' Motion for Sanctions against the Plaintiff for discovery violations should be granted.

Accordingly, it is now

RECOMMENDED:

The Defendants Rod Shoap, Harvey Hudnall, Fred Bond, Kenneth Erne, David Bonsall, Mark Durling, John McDougall, Brad Hamilton, Ross Di Pasquale, George Mitar' s (herein after Law Enforcement Defendants) Motion for Sanctions Filed out of Time (Doc. # 229) should be GRANTED.

(1) It is respectfully recommended that the case against the Law Enforcement Defendants should be **DISMISSED with PREJUDICE.**

(2) It is further respectfully recommended that the Law Enforcement attorney's fees and costs for bringing this Motion and two previous motions to compel (Docs. # 130 & 140) should be imposed as sanctions against the Plaintiff.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended at Fort Myers, Florida, this 23rd day of February, *2005.*

UNITED STATES MAGISTRATE JUDGE

Copies:
Counsel of Record
Presiding District Judge
DCCD

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

BRIAN BEVAN,

Plaintiff,

vs. Case No. 2:O3-cv-500-FtM—29SPC

MIKE SCOTT, in his official capacity as Sheriff of Lee County, Florida[1], ROD SHOAP, individually, JOHN MCDOUGALL, individually, KENNETH ERNE, individually, MARK DURLING, individually, HARVEY HUDNALL, individually, FRED BOND, individually, DAVE BONSALL, individually, ROSS DI PASQUALE, individually, SERGEANT HAMILTON, individually,RICHARD TRAVIS COWART, individually,CLAUDIA GADD COWART, individually, JACKIE COWART individually, SOUTHWEST UTILITY SYSTEMS, INC., a Florida corporation, CHUCK FUNDERMARK, individually, and CHUCK'S WHISKEY CREEK SERVICE, INC., a Florida corporation,

Defendants.

_____/

OPINION AND ORDER

____ This matter comes before the Court on the following summary judgment motions: (1) Law Enforcement Defendants' Motion for Summary Judgment and Incorporated Memorandum of Law[2] (Doc. #142),

[1]Current Sheriff Mike Scott is substituted for the former sheriff pursuant to Fed. R. Civ. P. 25(d) (1)

[2]The Law Enforcement Defendants include Rod Shoap, John McDougall, Kenneth Erne, Mark Durling, Harvey Hudnall, Fred Bond,

to which a Response (Doc. #165) was filed; (2) Defendants Chuck Fundermark and Chuck's Whiskey Creek Service, Inc.'s Motion for Summary Judgment and Memorandum of Law (Doc. #146), to which a Response (Doc. #163) was filed; (3) Defendants Claudia Cowart's and Richard Cowart's Motion for Summary Judgment with Supporting Memorandum of Law (Doc. #161), to

which a Response (Doc. #179) was filed; and (4) Plaintiff' Motion for Summary Judgment (Doc. #147) and Memorandum of Law (Doc. #148) to which Responses (Docs. #164, 170) were filed. Also before the Court is Defendants Claudia Cowart and Richard Cowart's Objection to Untimely Filing of Plaintiff's Response and Supporting Affidavits (Doc. #188), to which a Response (Doc. #193) was filed.

I.

Summary judgment is appropriate only when the Court is satisfied that "there is no genuine issue at to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if there is sufficient evidence such that a reasonable jury could return a verdict for either party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) . A fact is "material" if it may affect the outcome of the suit under governing law. Id. The moving party bears the burden of identifying those portions of the pleadings, depositions, answers to interrogatories, admissions, and/or

(continued)

Dave Bonsall, Ross Di Pasquale, and Brad Hamilton.

affidavits which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.s. 317, 323 (1986); Hickson Corp. v. Northern Crossarm Co., Inc., 357 F.3d1256,1259—60 (11th Cir. 2004)

To avoid the entry of summary judgment, a party faced with a properly supported summary judgment motion must come forward with extrinsic evidence, i.e., affidavits, depositions, answers to interrogatories, and/or admissions, which are sufficient to establish the existence of the essential elements to that party's case, and the elements on which that party will bear the burden of proof at trial motion. Celotex Corp., 477 U.S. at 322; Hilburn v. Nurata Elecs. N. Am., Inc., 181 F.3d 1220, 1225 (11th Cir. 1999). If there is a conflict in the evidence, the non-moving party's evidence is to be believed and all reasonable inferences must be drawn in favor of the non-moving party. Shotz v. City of Plantation, Fl., 344 F.3d 1161, 1164 (11th Cir. 2003).

II.

The origin of this action is a real property boundary dispute which began near

century ago. In 1981, Brian and Jane Bevan (the Bevans)

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No. 83-3955 CA(continued...)

day jury trial, a Final Judgment (the Final Judgment) was entered quieting title in favor of Graves. The Bevans were required to execute a quit claim deed conveying certain real property (the Property) to Graves, and the failure to do so within twenty days resulted in the Final Judgment operating as the conveyance. The Final Judgment also ordered that certain deeds be reformed,

and the Bevans were ordered to take nothing on their counterclaim against Graves. The Final Judgment also recognized a non-exclusive roadway easement to the Property adjacent to the Bevans' property. The Final Judgment was affirmed on appeal, although an award of attorney fees to Graves was reversed. Bevan v. Graves, 539 So. 2d 485 (Fla. 2d DCA 1989)

In 1991 Graves sold Richard and Claudia Cowart (the Cowarts), then husband and wife, property on Logan Lane, including the Property subject to the 1987 Final Judgment. The Bevans continued to assert proprietary rights to the Property and to assert that the Cowarts did not own the Property. Sometime prior to 1992, Brian Bevan erected a gate[4] on a portion of property to which he had an

3(~ . .continued)
WJN, in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida, is hereinafter referred to as the "Graves/Bevans Case."

[4]As viewed in the videos submitted by the parties, the gate had a mailbox attached to it. The Court includes the mailbox as part of the gate whenever reference is made to the "gate."

easement and placed a trailer[5] on a portion of the Property which the Cowarts owned by quit claim deed pursuant to the Final Judgment. The Cowarts requested that plaintiff remove the gate from the easement parcel and the trailer from the real property.

In October 1992, after plaintiff refused to remove these items, the Cowarts initiated an action in state court against the ~evans seeking temporary and permanent injunctive relief, including removal of a trailer and ceasing interference with their Property.[6] On April 9, 1993 *(nunc pro tunc* Nay 4, 1993), a state Circuit Court Judge entered a Temporary Restraining Order (TRO) in the 1992 State Case which, among other things, temporarily enjoined the Cowarts from the use of the Masanabo Lane property and enjoined the Bevans from use of the Logan Lane property. The TRO provided that "this Order may be enforced by any police agency within the State of Florida, including the Lee County Sheriff's Department, or any other local or state policy agency with jurisdiction over the parties physical location." In August 2000, the 1992 State Court Case was voluntarily dismissed by the Cowarts.

On December 29, 1997, the Bevans filed suit against the Cowarts and Southwest Utility Systems, Inc. ("Southwest Utility"), a Florida corporation owned by Richard Cowart, alleging a right to

[5]The trailer contained Plaintiff's personal property, and the Court includes the contents when it references the "trailer."

[6]Cowart v. Bevan, Case No. 92-8680-CA-WCM (Fla. Cir. Ct. filed Oct. 30, 1992) is hereinafter referred to as the "1992 State Case."

access to a sewer cleanout on the Cowarts' property.[7] The Cowarts filed a counterclaim seeking the same relief as in the 1992 State Case, and as noted earlier ultimately voluntarily dismissed the 1992 State Case.

On June 9, 1999, a state Circuit Court judge entered an Order Dissolving Temporary Restraining Order in the 1992 State Case which dissolved the Temporary Restraining Order dated April 9, 1993 in its entirety. The Order Dissolving Temporary Restraining Order further stated that the Court had not ruled on the Cowarts' right to use lands described as the South Parcel, had not determined the physical location of the South

Parcel, and had not determined the location of the easement. The Order Dissolving Temporary Restraining Order did not adversely affect the Cowarts' title to the Property and the easement rights under the 1987 Final Judgment, but it also did not affirmatively authorize the Cowarts to remove the gate or trailer from the Property.

On August 20, 1999, the Cowarts' attorney sent a certified letter to plaintiff which stated in full:

> Please be advised that my clients wish to make use of their entire parcel and accordingly make use of and traverse Massanabo Lane. Currently, you have caused to be erected a fence and have abandoned property that obstructs the use of a portion of my clients' property. Please be advised that unless all obstructions are removed within ten (10) days from the date of this letter, my clients will have those obstructions removed.

[7]Bevan v. Cowart, Case No. 97-9879 CA LG (Fla. Cir. Ct. filed Dec. 29, 1997) is hereinafter referred to as the "1997 State Case."

> My clients do not wish to engage in any sort of confrontation. Rather, they simply wish to make use of their land. While I realize that you currently contest the validity of Judge Thompson's Order and the corresponding property lines, the current status of all judicial proceedings does not preclude my clients from

the use of all their lands and right to use Masanabo. Please govern yourself accordingly.

On August 30, 1999, plaintiff through counsel filed a Petition for Temporary Injunction in the 1997 State Case asserting that the Cowart's through counsel had threatened to remove personal property and vegetation belonging to Bevan, that a temporary injunction was needed to prevent this action, and that there was a potential for physical confrontation. Also on August 30, Bevan filed a ***pro se*** Petition for Temporary Injunction in the 1992 State Case based upon the same letter from the Cowarts' attorney and making the same allegations, including the potential for physical confrontation.

On the morning of August 31, 1999, Richard Cowart directed Southwest Utility employees to remove the gate with heavy equipment and caused the trailer to be towed by Chuck's Whiskey Creek Service, Inc. ("Chuck's Whiskey Creek") and Chuck Fundermark (Fundermark) . The gate and some citrus trees were destroyed in the process. The Cowarts called the Lee County Sheriff Office for deputies to maintain the peace, and defendants Hamilton, Di Pasquale, Bond, Hudnall,

and Erne arrived and were present during the removal.[8] Defendants Shoap, McDougall, Durling, Bonsall, and Claudia Cowart were not present.

On August 31, 1999, a Lee County Circuit Court Judge heard arguments on the request for a temporary injunction in the 1992 State Case. The Circuit Judge entered an Order of Temporary Injunction directing, among other things, that the Cowarts and their employees and agents cease and desist from clearing the property described in their quit claim deed, that the property be maintained in its status quo condition as of 12:30 p.m. on August 31, 1999, and that neither party park vehicles, make plantings, or place other personal property on the property.

On July 10, 2001, Bevan filed a Second Amended Complaint in the 1997 State Case to include recovery of damages for the August 31, 1999 destruction of his personal property. Bevan set forth claims for trespass for the Cowarts putting a fence and building on the easement; an injunction to remove the fence and a building; an injunction precluding entry on Masanabo

Lane; quiet title/ejectment from the easement and Property; rescission of the Cowarts title based upon fraud; slander of title; and fraud. The 1997 State Case remains pending.

On August 29, 2003, plaintiff filed this federal action based on the August 31, 1999 activity, and on February 4, 2004, filed an

[8]Additional facts concerning the August 31 events are set forth later in more detail as necessary to resolve the individual motions.

eight—count Amended Complaint (Doc. #89) . The Court subsequently dismissed several claims pursuant to various motions to dismiss[9]. The remaining claims are as follows: (1) Counts I and II: § 1983 claims for violation of plaintiff's rights under the Fourth, Fifth, and Fourteenth Amendments based on the destruction of property without compensation and without procedural due process; (2) Count III: a § 1983 claim against the non—law enforcement officers for unlawful seizure based upon the removal, towing, and impoundment of plaintiff's trailer; (3) Count IV: a state law assault claim against the Cowarts, Southwest Utility, Fundermark,

Chuck's Whiskey Creek, and the law enforcement defendants; (4) Count VT: a state law claim for negligence as to the non-law enforcement defendants;

(5) Count VIII: § 1983 claims against the law enforcement officers based upon an unlawful search and seizure without probable cause, failure to inform plaintiff of the nature and cause of the accusations against him, and denial of due process and equal protection; and (6) Count VIII: a "destruction of evidence" claim against George Mitar.

[9]The Court's June 21, 2004 Order (Doc. #103) dismissed Count IV with prejudice as to defendant Shoap [now Scott] in his official capacity, Count V with prejudice as to the law enforcement defendants in their individual capacities and without prejudice against defendant Shoap [now Scott] in his official capacity, and Count VIII with prejudice as to defendant Shoap [now Scott] in his official capacity.

III.

The Cowarts assert that they are entitled to a judgment as a matter of law because Bevan's claims are barred by the doctrines of res judicata and collateral estoppel in light of the 1987 Final Judgment quieting title

in favor of Graves, their predecessor in title. The Court disagrees.

The Full Faith and Credit Clause of the United States Constitution, U.S. Const. Art. IV, §1, requires the Court to apply the State's law of collateral estoppel and res judicata to civil rights actions arising under 42 U.S.C. § 1983. Allen v. McCurry, 449 U.S. 90, 103-05 (1980); Brown v. City of Hialeah, 30 F.3d 1433, 1437 (11th Cir. 1994) . Res judicata generally bars relitigation of matters that were litigated or could have been litigated in an earlier suit. Nevada v. United States, 463 U.S. 110, 130 (1983); Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1187 (11th Cir. 2003) . Under Florida law, res judicata requires (1) the identity of the thing sued for, (2) the identity of the cause of action, (3) the identity of the persons and parties to the action, and (4) the identity of the quality or capacity of the person for or against whom the claim is made. Saboff v. St. John's River Mgt. Dist., 200 F.3d 1356, 1360 (11th Cir.), cert. denied, 531 U.S. 823 (2000). "Under Florida law, collateral estoppel applies if (1) an identical issue, (2) has been fully litigated, (3) by the same parties or their privies, and (4) a

final decision has been rendered by a court of competent jurisdiction." Quinn v. Monroe County, 330 F.3d 1320, 1329 (11th Cir. 2003) . See also Gentile v. Bauder, 718 So.2d 781, 783 (Fla. 1998) (citation omitted) ("Under Florida law, collateral estoppel, or issue preclusion, applies when the identical issue has been litigated between the same parties or their privies."); Department of HRS v. B.J.M., 656 So. 2d 906, 910 (Fla. 1995); GLA and Assocs., Inc. v. City of Boca Raton, 855 So.2d 278, 281 (Fla. 4th DCA 2003) . A federal court will give preclusive effect to a judgment of a state court if the courts of the state from which the judgment was rendered would do so and if the litigants had a full and fair opportunity to litigate their claims and the prior state proceedings otherwise satisfied the applicable requirements of due process. Urfirer v. Cornfeld, 408 F.3d 710, 717—18 (11th Cir. 2005); Quinn, 330 F.3d at 1239.

This federal case involves the events of August 31, 1999, and the alleged liability of defendants for activities on that date. Nothing about the Graves/Bevans Case or the 1987 Final Judgment decided or could have decided

the legal claims or issues raised by the self-help events of some twelve years later. The § 1983 claims and the state law claims arising from the August 31, 1999 events were not part of the same cause of action as the 1987 quiet title action and were not decided in that state court proceeding, and therefore Bevan's current federal claims are not precluded by collateral estoppel or res judicata. E.g., Webb v. State of Ala., 850 F.2d 1518, 1520—22 (11th Cir. 1988)

Iv.

The Court will first discuss the § 1983 claims - Counts I, II III, and VII - since those are the only federal claims in the Amended Complaint.

Title 42 U.S.C. § 1983 imposes liability on any person who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." To establish a claim under 42 U.S.C. § 1983, plaintiffs must allege and ultimately prove that (1) defendant deprived them of a right secured under the United States Constitution or federal law, and (2) such deprivation occurred under color of state law.

Arrington v.Cobb County, 139 F.3d 865, 872 (11th Cir. 1998); U.S. Steel, LLC v. Tieco, Inc., 261 F.3d 1275, 1288 (11th Cir.), reh'g and reh'g en banc denied, 277 F.3d 1381 (11th Cir. 2001) . In addition, plaintiffs must allege and establish an affirmative causal connection between the defendants' conduct and the constitutional deprivation. Troupe v. Sarasota County, Fla.,F.3d, 2005WL 1813304, at *3 (11th Cir. Aug. 3, 2005); Marsh v. Butler County, 268 F.3d 1014, 1059 (11th Cir. 2001) . Section 1983 is not itself a source of substantive rights, but merely provides a procedural mechanism for vindicating federal rights created elsewhere. "One cannot go into court and claim a 'violation of § 1983' — § 1983 by itself does not protect anyone against anything." Gonzaga Univ. v. Doe, 536 U.S. 273, 285 (2002) (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979)) . See also Skinner v. City of Miami, Fla., 62 F.3d 344, 347 (11th Cir. 1995)

In one fashion or another, all defendants argue that plaintiff was not deprived of a right secured under the United States Constitution or federal law, and that any

such deprivation did not occur under color of state law. The Court will first address the "under color of state law" requirement of a § 1983 action, also referred to as "state action."

A.

A primary issue is whether the self-help ejection orchestrated by the Cowarts can be considered to have been done under the color of state law. A § 1983 claim requires plaintiff to show that the conduct was committed by a person acting under the color of state law at the relevant time. Loren v. Sasser, 309 F.3d 1296, 1303 (11th Cir. 2002), cert. denied Newbold v. Sasser, 538 U.S. 930, 1057 (2003)) . "Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." Focus on the Family v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1276—1277 (11th Cir. 2003) (quoting American Mfrs. Nut. Ins. Co. v. Sullivan, 526 U.S. 40, 49—50 (1999) (internal punctuation and citations omitted))

A private person may be viewed as a state actor under certain circumstances. Focus on Family, 344 F.3d at 1277 (recognizing three tests used to determine whether person was state actor)

Action is considered to be under color of state law if there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly attributed to the State. Brentwood Aced. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001). The Supreme Court has stated that "[w]hat is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity." Erentwood Acad., 531 U.S. at 295. The Supreme Court further noted that "no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, . . ." Id. Rather, the Supreme Court's prior decisions have "identified a host of facts that can bear on the fairness of such an attribution." Id. at 296. As examples of circumstances where state action had been found, the Court pointed to

situations where the challenged activity resulted from the State's exercise of "coercive power;" where the State provided "significant encouragement, either overt or covert;" where a private actor operated as a "willful participant in joint activity with the State or its agents;" where the nominally private entity was controlled by an agency of the State; where the nominally private entity had been delegated a public function by the State; and where the private entity was entwined with governmental policies or when government was entwined with the entity's management or control. Id. (citations omitted)

The determination of whether there is action under color of state law is a "necessarily fact-bound inquiry." Id. at 298 (citation omitted) . It is, however, a rare circumstance where a private party can be viewed as a state actor for § 1983 purposes. Rayburn ex rel. Rayburn v. Hogue, 241 F.3d 1341, 1347 (11th Cir. 2001).

At the time of the August 31, 1999 events, it was an established fact that the Cowarts had purchased the Property, including the non-exclusive access easement. Bevan constructed a gate across the easement and placed

his trailer on the Property, asserting a legal right to do so despite the Final Judgment. The Cowarts caused an attorney to send the ten-day letter to Bevan and arranged for the self-help ejection of the trailer and gate from the Property and easement utilizing their own personnel. The Cowarts called the Sheriff's Office and asked deputies to come to the scene to stand by and keep the peace. Bevan and his attorney also recognized the potential for physical confrontation in their requests for a temporary injunction form the state court. Richard Cowart was at the scene and supervised the activities of the persons doing the actual work. The Court finds that the activities up to this point did not satisfy the "under color of state law" requirement for a § 1983 action.

The issue becomes whether the presence or conduct of the law enforcement officers converted this private self-help conduct into action performed under color of state law. This turns on the level of involvement of the law enforcement officers. If the officers' level of involvement was nothing more than mere presence to prevent a breach of the peace, the required state action is lacking. Menchaca v. Chrysler Credit Corp., 613 F.2d

507 (5th Cir.), cert.denied, 449 U.S. 953 (1980); Booker v. City of Atlanta, 776 F.2d 272 (11th Cir. 1985); Cofield v. Randolph County Comm., 90 F.3d.468, 471-72 (11th Cir. 1996) . State action might be present if an officer facilitates an eviction. Booker, 776 **F.2d** at 274; Menchaca, 613 F.2d at 513; Cofield, 90 F.3d at 471. Cofield found insufficient facts to support state action where the repossession was complete before any contact with deputies. On the other extreme, deputy sheriffs who assist in a forcible eviction that is patently unlawful are sufficiently involved so as to create state action. Soldal v. Cook County, Ill., 506 U.S. 56 (1992)

More recent appellate decisions have cited these and other decisions as standing for the following principle: "officers are not state actors during a private repossession if they act only to keep the peace, but they cross the line if they affirmatively intervene to aid the repossessor." Marcus v. McCollum, 394 F.3d 813, 818 (10th Cir. 2004) . See also Barrett v. Harwood, 189 F.3d 297 (2d Cir. 1999) . "The key inquiry, of course, is whether the officer's conduct was designed to keep the

peace or to aid in the repossession." Marcus, 394 F.3d at 817 n.3.

If the allegations in the Amended Complaint (Doc. #89) and Plaintiff's Response (Doc. #165) - that the deputies ordered the seizures and destruction of his property - were supported by evidence, the state action element would clearly be satisfied. However, there is no factual evidence that the deputies ordered any actions by the private defendants. The deputies have filed Affidavits establishing that none ordered such conduct, and the Cowarts have filed Affidavits stating that they made the decision to remove the items upon advice of counsel. Bevan's largely conclusory affidavit does not state facts to the contrary as to these officers.

Plaintiff's Affidavit (Doc. #186) states that the videotape made by the Sheriff's Office shows Commander Erne "issuing instructions and directing the actual destruction and destroying of the Plaintiff's Property." The Court has personally reviewed the videotape made by the Sheriff's Office and the videotape made by Plaintiff. There is no evidence supporting

plaintiff's assertion that Commander Erne gave instructions or directions to destroy plaintiff's chattel. In fact, on the videotapes Commander Erne calmly spoke with plaintiff and repeatedly stated that he and the other deputies were present to keep the peace. Commander Erne then retreated to his vehicle.

Additionally, Sgt. Hamilton, surrounded by plaintiff and Cowart's employees, is shown telling Bevan that either Bevan removes the mailbox from the gate or "we'll remove it and place the mailbox on your property." (Doc. #148, Time: 4:21-4:40). There is no evidence which shows Sgt. Hamilton directing or instructing the private actors to destroy plaintiff's property; indeed, Sgt. Hamilton is clearly trying to prevent the mailbox from being destroyed by Cowart's personnel when they removed the gate. Under the circumstances, the evidence shows nothing more than Sgt. Hamilton's attempt to maintain the peace on the site. Thus, the Sheriff's videotape and plaintiff's videotape both contradict plaintiff's assertions and do not support his claim on summary judgment.

While there is no factual evidence that the deputies ordered the removal or destruction of plaintiff's property, their conduct must be examined to determine if it nonetheless satisfies the state action requirement.

The Affidavit of Rodney Shoap (Doc. #142, Exhibit 5) establishes that he was the Major of Special Operations for the Lee County Sheriff's Office on August 31, 1999; that he was the Sheriff by the time this federal suit was filed; that he was not present at the scene of the property disputed byplaihtiff and the Cowarts on August 31, 1999; that he had no prior knowledge that the Cowarts intended to clear the property on August 31, 1999; that he was not involved in any way in the events that took place on August 31, 1999; and that he has no personal knowledge of the events of August 31, 1999, between plaintiff and the Cowarts. These facts are not disputed by plaintiff. Therefore, the conduct of former Sheriff Shoap cannot establish state action in this case.

The Affidavit of Mark Durling (Doc. #142, Exhibit 7) establishes that he was the Chief of the Law Enforcement Bureau of the Lee County Sheriff's Office

on August 31, 1999; that he was not present at the scene of the property disputed by plaintiff and the Cowarts on August 31, 1999; that he had no prior knowledge that the Cowarts intended to clear the property on August 31, 1999; that he was not involved in any way in the events that took place on August 31, 1999; and that he has no personal knowledge of the events of August 31, 1999, between plaintiff and the Cowarts. These facts are not disputed by plaintiff. Therefore, the conduct of Chief Durling cannot establish state action in this case.

The Affidavit of David Bonsall (Doc. #142, Exhibit 8) establishes that he was a Lieutenant Colonel with the Lee County Sheriff's Office on August 31, 1999; that he was not present at the scene of the property disputed by plaintiff and the Cowarts on August 31, 1999; that he had no prior knowledge that the Cowarts intended to clear the property on August 31, 1999; that he was not involved in any way in the events that took place on August 31, 1999; and that he has no personal knowledge of the events of August 31, 1999, between plaintiff and the Cowarts. These facts are not disputed by plaintiff. Therefore, the conduct of Chief Durling cannot establish state action in this case.

The Lee County Sheriff deputies who were present during the August 31, 1999, events have also submitted affidavits. The Affidavit of Sgt. Brad Hamilton (Doc. #142, Exhibit 1) states that he and the other officers were called by the Cowarts to the Property, and the Cowarts "explained that they had a court order permitting them to reclaim their land and remove all encumbrances, including a trailer, a fence, a mailbox and citrus trees." Sgt. Hamilton ~'was aware of said order and believed it to be authentic and accurate" but did not make or retain a copy of the order. The Cowarts showed Sgt. Hamilton "an Order authorizing them to destroy and or remove Mr. Bevan's property and asked that the Lee County Sheriff's Office stand by to keep the peace in the event violence broke out." The officers who responded to the scene stood by as the Cowarts enlisted the help of others to remove the trailer, fence, mailbox and citrus trees, and did not participate in the removal or destruction of the property. The sole purpose of the officers' presence was to keep the peace between the Bevans and the Cowarts; the officers did not threaten plaintiff with physical violence or to arrest plaintiff other than say they would

arrest Plaintiff if he committed violence against the individuals at the scene that day. An officer also told plaintiff he should move his vehicle so the Cowarts would not destroy or tow it.

The Affidavit of Kenneth Erne (Doc. #142, Exhibit 2) states that on August 31, 1999, he was the Sheriff's Office District Commander for the West District of Lee County. The content of the Affidavit is substantially similar to that of Sgt. Hamilton, except that he was not shown a copy of the court order authorizing destruction or removal of the property, rather the order was shown to Sgt. Hamilton.

The Affidavit of Detective Ross Di Pasquale (Doc. #142, Exhibit 3) states that on August 31, 1999, he was a detective for the Sheriff's Office. The content of the Affidavit is substantially similar to that of Sgt. Hamilton, except that Detective Di Pasquale states that either the Cowarts or a fellow officer made him aware of an Order signed by a Lee County Circuit Judge dissolving a Temporary Restraining Order, and that as a result of this Order Mr. Bevan (this is obviously a

typographical error which should have referred to the Cowarts) asked the Sheriff's Office to stand by and keep the peace.

The Affidavit of Harvey Hudnall (Doc. #142, Exhibit 4) states that on August 31, 1999, he was a part—time deputy with the Sheriff's Office. The content of the Affidavit is substantially similar to that of Sgt. Hamilton, except that Deputy Hudnall states that either the Cowarts or a fellow officer made him aware of an Order signed by a Lee County Circuit Judge dissolving a Temporary Restraining Order, and that as a result of this Order Mr. Bevan (again, this is obviously a typographical error which should have referred to the Cowarts) asked the Sheriff's Office to stand by and keep the peace.

Plaintiff submitted affidavits indicating that the law enforcement defendants' participation included filming the event, The Court finds that presence at the location and videotaping the incident does not constitute state action. E.g., United States v. Behety, 32 F.3d 503, 511 (11th Cir. 1994) (Fourth Amendment generally inapplicable to actions by foreign officials in their own

countries enforcing their own laws, even if American officials are present and cooperate in some degree; presence of federal agent and
videotaping of search does not constitute level of participation necessary to bring conduct of foreign officials within scope of Fourth Amendment) . Nothing about Deputy Fred Bond videotaping the events aided the Cowarts in their conduct, any more than plaintiff's videotaping did. The videotapes simply memorialized the events.

The Court finds that the actions of the deputies were not sufficient to constitute state action. The deputies were called to the scene by the Cowarts to keep the peace, did not participate in the removal of the property, and simply told plaintiff he would be arrested if he became violent. The deputies on the scene did not cross the line from mere presence to prevent a breach of peace to facilitating an ejectment. Their conduct did not result in the private ejectment being converted to action under color of state law.

Finally, plaintiff asserts that one of the law enforcement defendants requested a tow truck to remove his trailer. Plaintiff argues that this is sufficient to constitute state action as to all the law enforcement defendants. There is no evidence that any of the deputies at the scene requested the tow truck, and plaintiff does not identify any particular deputy as having done so.

However, Chuck Fundermark signed a September 11, 2003 letter, in which he stated that he was on the Lee County Sheriff's Office towing roster, that he responded to a Lee County Sheriff's call to remove a camper trailer, that he removed the trailer "at the order of the Sheriff," and that if he had refused to remove the trailer he could have lost his rotation business with the Sheriff. (Doc. #31) . This is contradicted by the Affidavit of John McDougall (Doc. #142, Exhibit 6), which establishes that he was the Sheriff of Lee County, Florida on August 31, 1999; that he was not present at the scene of the property disputed by plaintiff and the Cowarts on August 31, 1999; that he had no prior knowledge that the Cowarts intended to clear the property on August 31, 1999; that he was not involved in any way in the events that took place

on August 31, 1999; and that he had no personal knowledge of the events of August 31, 1999, between plaintiff and the Cowarts.

Viewing the evidence in favor of plaintiff, as the Court must at this stage of the proceedings, the Court finds that the removal of the trailer from the premises upon order of the Sheriff constitutes conduct performed under color of state law[10]. This state action, however, only occurred with regard to the removal of the trailer; the conduct of law enforcement officers prior to that time did not amount to conduct under color of state law, as discussed above.

Plaintiff further argues that the law enforcement defendants and the private defendants conspired to violate plaintiff's

[10]This is so even if the Court deems the requests for admissions admitted because plaintiff failed to respond. The deemed-admitted facts that neither Fundermark or Whiskey Creek Service were employees or agents of the Sheriff's Office does not contradict the facts set forth in Fundermark's letter.

constitutional rights, and this conspiracy satisfies the under color of state law requirement as to all of the

events of August 31, 1999. State action can exist if there is a joint venture or a conspiracy between private persons and state actors. Rowe v. City of Fort Lauderdale, 279 F.3d 1271, 1285 (11th Cir. 2002) . Under the facts presented in the summary judgment record, a reasonable jury could only find a conspiracy between the Sheriff and one or more private actors as to removal of the trailer. Therefore, state action is only established as to the removal of the trailer.

B.

The second § 1983 issue is whether any of plaintiff's constitutional rights were violated. Read liberally, the Amended Complaint asserts that the August 31 conduct violated the following constitutional rights: (1) seizure of property in violation of the Fourth Amendment; (2) taking of property without just compensation in violation of the Fifth Amendment; (3) failure to inform plaintiff of the nature and cause of the accusations against him in violation of the Sixth and Fourteenth Amendments; (4) taking of property without procedural due process in violation of the Fourteenth Amendment; and (5) denial of equal protection of laws in

violation of the Fourteenth Amendment. The Court concludes that the summary judgment facts do not show a violation of any of these constitutional rights.

(1) Fourth Amendment: The Fourth Amendment provides in pertinent part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." The Fourth Amendment is made applicable to the States by the Fourteenth Amendment, Ker v. California, 374 U.S. 23, 20 (1963), and fully applies in the civil context. Soldal, 506 U.S. at 66-67 n.ll. A search or seizure by a private party, however, does not implicate the Fourth Amendment unless that party is acting as an instrument or agent of the government. Walter v. United States, 447 U.S. 649, 656 (1980); Collidge v. New Hampshire, 403 U.S. 443, 487 (1971); Burdeau v. McDowell, 256 U.S. 465, 475—76 (1921) . A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property. Soldal, 506 U.S. at 61. A seizure violates the Fourth Amendment only if it is unreasonable. Id. at 61-62.

As in Soldal, there can be no doubt that the conduct in this case constituted a "seizure" of the gate, trailer and incidental personal property. It is undisputed that the non-law enforcement defendants physically removed the gate and the trailer and in so doing damaged or destroyed other personal property. Viewed in the light most favorable to plaintiff, those seizures cannot be within the scope of the Fourth Amendment until the Sheriff ordered Fundermark to remove the trailer. Up until that point, the events were not being conducted under the color or state law, as discussed above, and the private actors were not acting as an instrument or agent of the government.

The seizure of the trailer only violates the Fourth Amendment if it is unreasonable, which requires a careful balancing of governmental and private interests. Soldal, 506 U.s. at 71. "[R]easonableness is still the ultimate standard under the Fourth Amendment, which means that numerous seizures of this type will survive constitutional scrutiny." Soldal, 506 U.S. at 71 (internal quotation marks and citation omitted) . Booker and Soldal were concerned only with the issue of state action, and do not

support theories of liability based on the officers' presence or aid at a self-help ejection. Cofield, 90 F.3d at 472 n.6.

For summary judgment purposes, the Court does not credit the portions of the deputies' affidavits stating there was a court order authorizing the Cowarts to destroy and/or remove Bevan's property. Plaintiff has filed affidavits which assert that no such court order was ever issued by any judge, and the record supports plaintiff on this point. No defendant has produced a court order which authorized the Cowarts to remove or destroy the personal property. The Order Dissolving Temporary Restraining Order clearly does not so provide, and no reasonable officer who read that order could have concluded that a court had authorized the Cowarts' conduct.

The Court finds that the Sheriff's instruction to Fundermark to remove the trailer, in the absence of an authorizing court order, legal process, or an applicable exception to the warrant requirement, was unreasonable under the circumstances and therefore the seizure of the

trailer violated the Fourth Amendment. The other defendants who, under a view of the facts most favorable to plaintiff, can be liable for this conduct are the Sheriff (now Scott) in his official capacity, Richard Cowart, Fundermark, and Chuck's Whiskey Service. The Court further finds that the conduct of all the other defendants was reasonable under the circumstances and did not violate the Fourth Amendment. Defendants Shoap, Durling, Bonsall, and Claudia Cowart were not present at the scene and there is no basis for personal liability. Defendants Bond, Di Pasquale, Erne, Hamilton and Hudnall did not provide any instructions or directions beyond what was necessary to maintain the peace at the site and were not involved in the seizure of the trailer, and consequently did not violate the Fourth Amendment.

(2) Fifth Amendment: The Amended Complaint also claims that defendants took plaintiff's property without just compensation in violation of the Fifth Amendment. The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use without just compensation." U.S. Const. amend. V, cl. 4. The purpose of this

prohibition is to prevent "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)) . Real property, see Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992); personal property, see Andrus v. Allard, 444 U.S. 51, 65 (1979); and intangible property, see Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003—04 (1984), each may constitute the *res* of a takings claim. There are no facts in this case which indicate the property was taken for a purported public use. The context of this case does not give rise to a Fifth Amendment takings claim. Any such "takings" claim is subsumed in the Fourth Amendment seizure claim discussed above.

(3) Sixth amendment: The undisputed facts establish that there was no violation of Plaintiff's Sixth Amendment right to be informed of the nature and cause of the accusations against him. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and

cause of the accusation; . . . ." U.S. Const., amend. VT. The events of August 31, 1999, were not a criminal prosecution and plaintiff was not an "accused" in connection with those events. Therefore, no Sixth Amendment right exists in the context of this case, and none of the defendants violated plaintiff's Sixth Amendment right.

_____ **(4) Procedural Due Process:** The Amended Complaint alleges that Plaintiff was deprived of property without procedural due process in violation of his rights under the United States Constitution. The Fourteenth Amendment to the United States Constitution explicitly guarantees to each citizen that no State shall "deprive any person of life, liberty, or property, without due process of law... ." U.S. Const., amend. XIV, § 1. The same state action continuum as discussed under the Fourth Amendment applies under the procedural due process clause. Barrett, 189 F.3d at 301-303. "Under the Fourteenth Amendment, procedural due process requires notice and a pre-deprivation hearing before property interests are negatively affected by governmental actors." Marcus, 394 F.3d at 818 (citing Fuentes v. Shevin, 407

U.S. 67, 80-82 (1972)) . A possessory interest in property is sufficient to invoke procedural due process, even if a claim to continued possession is in dispute. Fuentes, 407 U.S. at 86—87; Barrett, 189 F.3d at 301; Dixon v. Lowery, 302 F.3d 857, 864 (8th Cir. 2002)

Here, it is undisputed that the gate, trailer and incidental personal property belonged to plaintiff; that a prior state court judgment determined that the Property belonged to the Cowarts' predecessor; that plaintiff nonetheless continued to dispute the location of the non-exclusive access easement and had placed the gate and trailer on this disputed portion of property; that after the initial restraining order was lifted, plaintiff was given notice by the Cowarts that they would use self-help if the property was not removed within ten days of August 20, 1999; that on the tenth day plaintiff and his attorney went to state court for a temporary injunction to preclude this self-help; that the state court conducted a hearing on the day after the request for a temporary injunction was filed, which was the day the Cowarts engaged in their self-help activities; and that the state court entered a temporary injunction preserving the status quo as of 12:30 p.m.

August 31, 1999. Assuming sufficient state action was involved in these events to justify invocation of the procedural due process provision of the U.S. Constitution, it is clear that plaintiff received all the process which was due him. Plaintiff received notice from the Cowarts, was given a time limit, waited until the last day to file his state court motion, and was given a hearing in state court the next day. Accordingly, plaintiff's procedural due process rights were not violated.

(5) Equal Protection: The Fourteenth Amendment provides in part "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. The Equal Protection Clause requires that similarly situated persons be treated alike. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985) . "The Equal Protection Clause requires that the government treat similarly situated persons in a similar manner." Gary v. City of Warner Robins, Ga., 311 F.3d 1334, 1337 (11th Cir. 2002)

Plaintiff has not identified a similarly situated group, or submitted any evidence showing dissimilar treatment in similar situations. Plaintiff is not a member of a suspect class and has not shown that defendant's acts were unrelated to a permissible government objective. Therefore, plaintiff has not established that his constitutional right to equal protection was violated. D'Aguanno v. Gallagher, 50 F.3d 877, 879 n.2 (11th Cir. 1995)

C.

Former Sheriff McDougall asserts that even if a constitutional right was violated, he is entitled to summary judgment based upon qualified immunity. The Sheriff (Scott) in his official capacity asserts that he is entitled to summary judgment because there is no evidence that a policy, custom or practice was the moving force behind any violation of plaintiff's constitutional right.

(1) Qualified Immunity:

Plaintiff can only establish a constitutional claim against the Sheriff in his individual capacity if the Sheriff

is not entitled to qualified immunity. Mercado v. City of Orlando, 407 F.3d 1152, 1156 (11th Cir. 2005) . To be eligible for qualified immunity, a defendant must first prove he was acting within the scope of his discretionary authority when the allegedly wrongful act occurred. Id.; see also Wood v. Kesler, 323 F.3d 872, 877 (11th Cir. 2003) . If this is shown, the burden shifts to plaintiff to show that qualified immunity is not appropriate. Mercado, 407 F.3d at 1156; Wood, 323 F.3d at 877.

The Court conducts a two-part inquiry to determine whether qualified immunity is appropriate. Harris v. Coweta County, 406 F.3d 1307, 1313—14 (11th Cir. 2005); Garrett v. Athens—Clarke County, 378 F.3d 1274, 1278—79 (11th Cir. 2004); Dahl v. Holley, 312 F.3d 1228, 1233 (11th Cir. 2003) . First, the court determines whether the summary judgment facts, viewed in a light most favorable to plaintiff, show that the officer's conduct violated a constitutional right. Brosseau v. Haugen, 125 S.Ct. 596, 598 (2004); Hope v. Pelzer, 536 U.S. 730 (2002); Saucier v. Katz, 533 U.S. 194, 201 (2001) . The second inquiry is whether, at the time of the violation, the constitutional right was clearly established

in light of the specific context of the case, not simply as a broad proposition. Brosseau, 125 S.Ct. at 599—600; Dahl, 312 F.3d at 1233. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Srosseau, 125 S.Ct. at 599.

(a) Discretionary Authority:

In this case, there is no dispute that the Sheriff was acting within the scope of his discretionary authority at the time of his allegedly wrongful conduct. Plaintiff affirmatively pled that the officers were acting within the scope of their authority as deputies (Doc. #39, ¶91 20, 34, 56, 58) and argues the same in his Response (Doc. #165) to the summary judgment motion. Thus, the burden shifts to plaintiff to show that qualified immunity is not appropriate.

(b) Violation of Constitutional Right:

The first question is whether the alleged~ conduct violated an actual constitutional right. As discussed above, the Court found that plaintiff's Fourth

Amendment right was violated when the Sheriff ordered the trailer removed.

(c) **Clearly Established Constitutional Right:**

Having found that the Sheriff's conduct violated plaintiff's Fourth Amendment right, the Court must determine whether, as of August 31, 1999, it was clearly established that the conduct of the Sheriff was unlawful under the circumstances in this case. Given the circumstances of this case, including the Final Judgment in favor of the Cowarts, the continued dispute between Bevan and the Cowarts concerning the Property, the dissolution of the initial restraining order, the conduct of the participants in the events as depicted by both videotapes, the Court concludes that it was not clearly established that the Sheriff would violate the Fourth Amendment by directing that the trailer be towed away. Thus, former Sheriff McDougall in his individual capacity is entitled to qualified immunity."

(2) Official Policy, Custom or Practice

"The remaining private party defendants did not plead qualified immunity as a defense. (Docs. #104, 108) . In any event, it is doubtful that qualified immunity would apply to private parties in the context of this case. Wyatt v. Cole, 504 U.S. 158 (1992) .

Sheriff Scott asserts that there is no evidence that any allegedly wrongful conduct was performed pursuant to an official custom or policy of the Sheriff's Office. Under § 1983, a governmental entity may not be held liable under a theory of ***respondeat superior,*** but instead may only be held liable when its "official policy" causes a constitutional violation. Monell v. Department of Soc. Servs., 436 U.S. 658, 694 (1978). Plaintiff can establish the requisite "official policy" in one of two ways: (1) identifying an officially promulgated policy, or (2) identifying an unofficial custom or practice shown through the repeated acts of the final policymaker of the entity. Grech v. Clayton County, Ga, 335 F.3d 1326, 1320-30 (11th Cir. 2003) . The policy or custom must be the moving force of the constitutional violation. Grech, 335 F.3d at 1330; see also Board of County Comm'rs v.

Brown, 520 U.S. 397, 403 (1997); Gold v. City of Miami, 151 F.3d 1346, 1350 (11th Cir. 1998) **12**

The Affidavit of former Sheriff Shoap states that "[i]t is not the policy of the Lee County Sheriff's Office to get involved in determining the merits of the civil dispute." (Doc. #142, ¶ 5)

The Affidavit further states that "it has been the policy of the Lee County Sheriff's Office to keep the peace in situations wherein citizens are repossessing property on their own, as such situations

[2]These principles also apply to the two private corporations named in the Section 1983 counts. Buckner v. Toro, 116 F.3d 450 (11th Cir. 1997).

are potentially volatile." (Id.). The Affidavits of the other deputies established that the Sheriff's Office policy is to not take sides in a civil dispute, but to be present to maintain the peace or to enforce court orders. Plaintiff submits no evidence contradicting the stated policy.

Plaintiff responds that the Sheriff's Office has had a custom and policy of harassing him for over twenty-

five years in retaliation for prevailing on appeal in a state court case. (Doc. #165) . Plaintiff cites examples of alleged harassment unrelated to the type of incident on August 31, 1999. Plaintiff has not sufficiently shown a policy related to the conduct in question, and the record is devoid of any evidence that the Sheriff made requests for tow truck removal in other similar situations as plaintiff's case. The Court therefore concludes that Scott is entitled to summary judgment because plaintiff has not shown the required custom or policy of the Sheriff's Office. Similarly, plaintiff has not shown a custom or policy with regard to Southwest Utilities or Whiskey Creek Service.

D.

In summary as to the Section 1983 claims, the Court finds as follows when the evidence is viewed in the light most favorable to plaintiff: The actions on August 31, 1999, involving the removal of the trailer were performed under the color of state law because there is evidence that the removal was ordered by the Sheriff; the prior and other actions that day were not performed under color of state law; plaintiff's Fourth Amendment right, but no other, was violated by the removal of the trailer;

the only persons or entities with potential liability for the unlawful seizure of the trailer are Richard Cowart, Sheriff Scott in his official capacity, former Sheriff McDougall in his individual capacity, and Chuck Fundermark. Former Sheriff McDougall is entitled to qualified immunity; Sheriff Scott in his official capacity is entitled to judgment because plaintiff has not established that a custom or policy of the Sheriff's Office was the moving force of the constitutional violation. Southwest Utilities and Chuck's Whiskey Service are entitled to summary judgment because there is no evidence that a custom or policy was the moving force of the constitutional policy. Therefore, the Section 1983 claims only remain viable as to Richard Cowart and Chuck Fundermark.

V.

Because the Court finds that a federal claim survives summary judgment, the Court now turns to the state claims. Plaintiff's remaining state claims are as follows: (1) assault claim against the Cowarts, Southwest Utility, Fundermark, Chuck's Whiskey Creek, and the law enforcement defendants, except for Scott; (2)

negligence claim against the non-law enforcement defendants; and (3) destruction of evidence against Mitar.

A. Count IV — Assault

Plaintiff alleges that defendants assaulted him and threatened him with physical arrest and violence if he attempted to interfere with the removal of his chattel from the Property. (Doc. #89, ¶91 44-47) . Defendants deny that an assault occurred.

Under Florida law, ~"assault is defined as an intentional unlawful offer of corporal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as to create a fear of imminent peril, coupled with the apparent present ability to effectuate the attempt." Lay v. Kremer, 411 So. 2d 1347, 1349 (Fla. 1st DCA 1982)

(1) Law Enforcement Defendants

McDougall, Erne, Durling, Hudnall, Bonsall, Di Pasquale, Durling, and Hamilton state that they did not threaten Brian Bevan with physical violence, and they did not see other officers threaten Brian Bevan. (Doc. #142,

Exhibits 1-5, 7-8) . In addition, they further assert that no one threatened to arrest Brian Bevan; rather they explained to Brian Bevan that he would be arrested if he committed violence against any individuals at the site. (Id.) . In his affidavits, plaintiff asserts that the law enforcement defendants witnessed Richard Cowart "menacingly wield[] a machete directly in front of [the presence of Brian, Jane, and Lisa Bevan] ." (Docs. #181-82, 186-87) . Jane Bevan states the same in her affidavits. (Docs. #206—08, 212) . Brian Bevan, also states that "[w]hile all this fear was being instilled into Brian Bevan, the Sheriff's Deputies, armed with loaded Glock Guns, continuously threatened to arrest Brian, Jane and Lisa Bevan." (Docs. #181-82, 18 6-87) . In light of the uncontroverted facts, the Court concludes that plaintiff has not established sufficient evidence of assault by the law enforcement defendants to satisfy the legal definition of an assault. Plaintiff's assault claim against these defendants cannot survive the summary judgment motion.

(2) **Non-law Enforcement Defendants**

(a) Fundermark and Chuck's Whiskey Creek

Fundermark and Chuck's Whiskey Creek argue there are undisputed facts based on plaintiff's outstanding request for admission. Fundermark and Chuck's Whiskey Creek assert that they are entitled to summary judgment because plaintiff failed to deny that they "did not make use of physical threat or force upon the Plaintiff." (Doc. #146, p. 7) . Plaintiff points out that Fundermark and Chuck's Whiskey Creek sent the request for admission to his former attorney, and consequently, plaintiff did not receive the request. Under the circumstances, the Court declines to treat the Request as admissions. However, the Court concludes that plaintiff has not pointed to facts which would establish the elements of assault as to either Fundermark or Chuck's Whiskey Creek. The Court will grant the summary judgment motion as to Count IV with respect to Fundermark and Chuck's Whiskey Creek.

(b) Cowarts and Southwest Utility

Plaintiff asserts that Richard Cowart and Southwest Utility's employees "raced a huge bulldozer down the Bevan's narrow private lane in a menacing manner toward the Bevan family." (Docs. #181-82, 186-

87) . Plaintiff also asserts that Richard Cowart made "an unlawful offer of corporal injury to Brian, Jane and Lisa Bevan when Richard Travis Cowart menacingly wielded a machete directly in front of their presence." (Id.) . Plaintiff further states that "'[t]he action of Richard Travis Cowart created a fear of imminent peril and I, Brian Bevan, had a reasonable apprehension of imminent harmful and offensive contact, because of Richard Travis Cowart's apparent ability to effectuate the assault." (Docs. #181-82, 186-87) . In addition, plaintiff states that Claudia Cowart "arranged for a bulldozer owned by her corporation and her Employees to assault the Bevan Family." (]Joc. #185) . Richard Cowart denies any assault was made on Brian Bevan. (Doc. #161, Exhibit E, ¶~iI 9-10) . Claudia Cowart states the same in her affidavit. (Doc. #161,

Exhibit D, ¶~I 8—9)

The Court finds that there are disputed material facts as to Richard Cowart which cause the claim to survive a motion for summary judgment. The Court concludes that the facts viewed in the light most favorable to plaintiff do not satisfy the elements of an assault claim as to Claudia Cowart and Southwest Utility,

and therefore the Court will grant summary judgment as to Claudia Cowart and Southwest Utility.

B. Count VI — Negligence

According to the Amended Complaint, plaintiff alleges that the non-law enforcement defendants negligently removed his chattel from the Property and damaged or destroyed the chattel as a result. (Doc. #89, ¶¶I 52-55). Under Florida law, "[n]egligence is the failure to observe for the protection of another's interest such care, precaution and vigilance as the circumstances justly demand whereby injury is done to such a person, or, in another form, negligence is the failure to do what a reasonable and prudent person would ordinarily have done, or the doing of what such a person would have done under the situation whereby injury is done to another." Russ v. State, 140 Fla. 217, 219–20 (Fla. 1939); see also Hiram Walker & Sons, Inc. v. Kirk Line, 877 F.2d 1508, 1515 (11th Cir. 1989)

The Cowarts and Southwest Utility argue that they are entitled to summary judgment as to the negligence claim because plaintiff fails to establish a

prima facie case for negligence. They contend that the undisputed facts show that neither the Cowarts nor Southwest Utility owed plaintiff a duty of care. Plaintiff does not address this argument in his Response.

Under Florida law, "a threshold issue in negligence is whether the defendant owed any duty to a plaintiff." Department of Envtl.Prot. v. Hardy, So. 2d , No. 5D04—860, 2005 WL 1787444, at *3(Fla. 5th DCA July 29, 2005) (quoting Robert—Blier v. Statewide Enter., Inc., 890 So. 2d 522, 523 (Fla. 4th DCA 2005)). Moreover, "[i]t is a question of law whether any duty in tort exists." McCain v. Florida Power Corp., 593 So. 2d 500, 503 (Fla. 1992). "A duty may arise from multiple sources: (1) legislative enactments or administration regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial precedent; and (4) a duty arising from the general facts of the case. Clay Elec. Co—op., Inc. v. Johnson, 873 So. 2d 1182, 1185 (Fla. 2003).

The Court concludes that the present case does not fall under any of the categories. The Amended

Complaint purports to allege a negligence claim; however, plaintiff fails to establish any facts to show that the non-law enforcement defendants owed a duty to him. The Court concludes that summary judgment should be granted in favor of the non-law enforcement defendants as to Count VI.

C. Count VIII Against Mitar

There is no factual evidence submitted by plaintiff which supports the claim for destruction of evidence as to defendant Mitar. Thus, the Court grants summary judgment in favor of Mitar with respect to Count VIII.

VI.

The Court now turns to plaintiff's Motion for Summary Judgment wherein he contends that he is entitled to summary judgment. For the most part, plaintiff's contentions in his summary judgment are similar to the arguments made in his response to the defendants' cross-summary judgment motions. Plaintiff, however, specifically focuses on the his unreasonable seizure, takings, and assault claims. For the reasons stated

above, the Court finds that plaintiff is not entitled to judgment on his unreasonable seizure or takings claim.

Accordingly, it is now

ORDERED:

1. Defendants Claudia Cowart's and Richard Cowart's Motion for Summary Judgment (Doc. #161) is GRANTED **in part and DENIED in part** for the reasons stated above.

2. Defendants Fundermark's and Chuck's Whiskey's Motion for Summary Judgment(Doc. #146) is **GRANTED in part and DENIED in part.** for the reasons stated above.

3. The Lee County Sheriff Defendants' Motion for Summary Judgment (Doc. #142) is GRANTED for the reasons stated above.

4. Plaintiff' Motion for Summary Judgment (Doc. #147) and Memorandum of Law (Doc. #148) is **DENIED** for the reasons stated above.

5. Judgment is granted in favor of all defendants and against plaintiff as to Count I; in favor of all defendants and against plaintiff as to Count II, except as to Richard Travis Cowart as it relates to the claim of a violation of the Fourth Amendment to the United States Constitution for the seizure of the trailer; in favor of all defendants and against plaintiff as to Count III, except as to Chuck Fundermark as it relates to the claim of a violation of the Fourth Amendment to the United States Constitution for the seizure of the trailer; in favor of all defendants and against plaintiff as to Count IV, except as to Richard Travis Cowart; in favor of all defendants and against plaintiff as to Count V; in favor of all defendants and against plaintiff as to Count VI; in favor of all defendants and against plaintiff as to Count VII; and in favor of defendant and against plaintiff as to Count VIII. The Clerk shall withhold the entry of judgment until the conclusion of the case.

DONE AND **ORDERED** at Fort Myers, Florida, this 13th day of September, 2005.

JOHN E STEELE
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

BRIAN BEVAN,

Plaintiff,

vs. Case No. 2:03—cv-500-FtM-2OSpC

MIKE SCOTT, individually and in his official capacity as Sheriff of Lee County, Florida, JOHN MCDOUGALL, individually, KENNETH ERNE, MARK DURLING, HARVEY HUDNALL, FRED BOND, DAVE BONSALL, ROSS DI PASQUALE, SERGEANT HAMILTON, RICHARD TRAVIS COWART, CLAUDIA GADD COWART, JACKIE COWART, SOUTHWEST UTILITY SYSTEMS, INC., CHUCK FUNDERMARK and CHUCK'S WHISKEY CREEK SERVICE, INC.,

Defendant.

_____/

ORDER

This matter is before the Court on consideration of the Magistrate Judge's Report and Recommendation (Doc. #242), filed February 23, 2005, recommending that the case against the Law Enforcement Defendants should be dismissed with prejudice, and that the Law Enforcement attorney's fees and costs for bringing this Motion and two previous motions to compel (Docs. #130 and 140) should be imposed as sanctions against plaintiff Brian Bevan. Plaintiff filed his Objection (Doc. #255) on March 7, 2005.

After conducting a careful and complete review of the findings and recommendations, a district judge may accept, reject or modify the magistrate judge's report and recommendation. 28 U.S.C. § 636(b) (1) ; Williams v. Wainwright, 681 F.2d 732 (11th Cir. 1982), cert. denied, 459 U.s. 1112 (1983) . In the absence of specific objections, there is no requirement that a district judge review factual findings *de novo,* Garvey v. Vaughn, 993 F.2d 776, 779 n. 9 (11th Cir. 1993), and the court may accept, reject or modify, in whole or in part, the findings and recommendations. 28 U.S.C. § 636(b) (1) (0). The district judge reviews legal conclusions *de novo,* even in

the absence of an objection. see cooper—Houston v. Southern Ry. Co., 37 F.3d 603, 604 (11th Oir. 1994); castro Bobadilla v. Rena, 826 F. Supp. 1428, 1431-32 (S.D. Fla. 1993), aff'd, 28 F.3d 116 (11th Cir. 1994) (Table)

After conducting an independent examination of the file and upon due consideration of the Report and Recommendation, the court accepts the Report and Recommendation of the magistrate judge as an alternative ruling to its Opinion and Order granting summary judgment as to these defendants. The court finds that plaintiff's failure to comply with the court's Orders demonstrates a willful and bad faith disregard towards the orders of this court and the other litigants involved in this case. The court, however, will not impose the Law Enforcement attorney's fees and costs for bringing this Motion and two previous motions to compel (Doc. #130 and 140) as sanctions against plaintiff.

Accordingly, it is now

ORDERED:

1. The Report and Recommendation is hereby **accepted** and

adopted by the Court to the extent that the Law Enforcement defendants will be dismissed, and otherwise **rejected** to the extent that the Court declines to impose fees and costs as sanctions.

The Objection (Doc. #255) is **overruled.**

2. In the alternative to the granting of summary judgment, the Court would dismiss with prejudice the Amended Complaint against Mike Scott, in his official capacity as Sheriff of Lee County, Florida, Rodney Shoap, John McDougall, Kenneth Erne, Mark Durling, Harvey Hudnall, Fred Bond, Dave Bonsall, Ross Di Pasquale, and Sergeant Hamilton.

DONE AND ORDERED at Fort Myers, Florida, this 19th day of September, 2005.

JOHN E STEELE
United States District Judge

Copies:
Hon. Sheri Poister Chappell
United States Magistrate Judge

Counsel of Record
Unrepresented parties

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

BRIAN BEVAN,

Plaintiff,

vs. Case No. 2:03-cv-500FtM29SPC

MIKE SCOTT, individually and in his official capacity as Sheriff of Lee County, Florida, JOHN MCDOUGALL, individually, KENNETH ERNE, MARK DURLING, HARVEY HUDNALL, FRED BOND, DAVE BONSALL, ROSS DI PASQUALE, SERGEANT HAMILTON, RICHARD TRAVIS COWART, CLAUDIA GADD COWART, JACKIE COWART, SOUTHWEST UTILITY SYSTEMS, INC., CHUCK FUNDERMARK and CHUCK'S WHISKEY CREEK SERVICE, INC.,

Defendant.

_____ _____ _____ _

_____This matter comes before the Court on Plaintiff's Motion for Reconsideration of Order Granting Summary Judgment and Memorandum of Law in Support Thereof (Doc. #267) filed on September 23, 2005. Also before the Court is Plaintiff's Motion for Reconsideration of Order Accepting the Report and Recommendation of Magistrate Chappell filed on September 27, 2005. (Doc. #268)'. Defendants have not filed a response to either motions, and the time to do so has now expired.

'Plaintiff also filed a duplicate motion on September 29, 2005 (Doc. #269); and the Court will terminate the September 29 Motion as moot.
Case 2:03-cv~00500~JES~SPC Document 271 Filed 10/18/2005 Page 2 of 4

On September 13, 2005, the Court granted summary judgment as to all the Law Enforcement Defendants, Claudia Cowart, Southwest Utility Systems, Inc. and Chuck's Whiskey Creek Service, Inc. with respect to all pertinent counts. The Court also granted summary judgment to Richard Travis Cowart and Chuck Fundermark as to Counts

VI. The summary judgment motions were otherwise denied. (Doc.#264)

On September 19, 2005, the Court accepted and adopted the Report and Recommendation of the magistrate judge as an alternative ruling to its September 13 Opinion and Order granting summary judgment as to the Law Enforcement defendants. (Doc. #266) . The magistrate judge recommended dismissal of the Law Enforcement Defendants as a sanction against plaintiff for his willful and bad faith disregard towards the orders of the Court and the other litigants involved in this case. (Id.).

Reconsideration of a court's previous order is an extraordinary remedy and, thus, is a power which should be used sparingly. American Ass'n of People with Disabilities v. Hood, 278 F. Supp. 2d 1337, 1339 (M.D. Fla. 2003), citing Taylor Woodrow Constr. Corp. v. Sarasota/Manatee Airport Auth., 814 F. Supp. 1072, 1072-73 (M.D. Fla. 1993) . The courts have "delineated three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; (3) the need to correct clear error or

prevent manifest injustice." Sussman v. Salem, Saxon & Nielsen, P.A., 153 F.R.D. 689, 694 (M.D. Fla. 1994)

"A motion for reconsideration should raise new issues, not merely readdress issues litigated previously." PaineWebber Income Props. Three Ltd. P'ship v. Mobil Oil Corp., 902 F. Supp. 1514, 1521 (M.D. Fla. 1995) . The motion must set forth facts or law of a strongly convincing nature to demonstrate to the court the reason to reverse its prior decision. Taylor Woodrow, 814 F. Supp. at 1073; PaineWebber, 902 F. Supp. at 1521. "When issues have been carefully considered and decisions rendered, the only reason which should commend reconsideration of that decision is a change in the factual or legal underpinning upon which the decision was based. Taylor Woodrow, 814 F. Supp. at 1072-73.

A motion for reconsideration does not provide an opportunity to simply reargue — or argue for the first time — an issue the Court has once determined. Court opinions "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." Quaker Alloy Casting Co. v. Gulfco Indus., Inc., 123

F.R.D. 282, 288 (N.D. Ill. 1988) . "The burden is upon the movant to establish the extraordinary circumstances supporting reconsideration." Mannings v. School Bd. of Hillsborough County, Fla., 149 F.R.D. 235, 235 (M.D. Fla. 1993). Unless the movant's arguments fall into the limited categories outlined above, a motion to reconsider must be denied.

Plaintiff contends that reconsideration is necessary to correct clear error and prevent manifest injustice. In support of this contention, however, plaintiff has done no more than reargue the merits of his position in his motion for summary judgment and oppositions to defendants' summary judgment motion and motion for sanctions. The Court has rejected that position and plaintiff has provided no reason to reconsider that decision. Thus, the Court concludes that plaintiff's motion is due to be denied.

Accordingly, it is now

ORDERED:

1. Plaintiff's Motion for Reconsideration of Order Granting Summary Judgment and Memorandum of Law in Support Thereof (Doc. #267) is **DENIED.**

2. Plaintiff Motion for Reconsideration of Order Accepting the Report and Recommendation of Magistrate Chappell is **DENIED.** The duplicate motion (Doc. #269) is terminated.

DONE AND ORDERED at Fort Myers, Florida, this 18th day of October, 2005.

JOHN E STEELE
United States District Judge
Copies:

Counsel of record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

BRIAN BEVAN,

Plaintiff,

vs. Case No. 2:03-cv-500-FtM-29SpC

MIKE SCOTT, individually and in his official capacity as Sheriff of Lee County, Florida, JOHN MCDOUGALL, individually, KENNETH ERNE, MARK DURLING, HARVEY 1-IUDNALL, FRED BOND, DAVE BONSALL, ROSS DI PASQUALE, SERGEANT HAMILTON, RICHARD TRAVIS COWART, CLAUDIA GADD COWART, JACKIE COWART, SOUTHWEST UTILITY SYSTEMS, INC., CHUCK FUNDERMARK and CHUCK'S WHISKEY CREEK SERVICE, INC.,

Defendant.

_____/

ORDER

_____This matter comes before the Court on various pending motions and matters from the pretrial conference completed on February 10, 2006. The Third Amended Joint Pretrial Statement (Doc. #306) filed on February 10, 2006, as discussed in detail in open court, shall control this case.

Accordingly, it is now

ORDERED:

1. Defendant Richard Travis Cowart's Motion to Take Judicial Notice of Documents Filed (Doc. #287) is **DENIED** because it is not clear what adjudicative facts defendant wants to be the subject of judicial notice. Rather, it appears that the motion goes to the authenticity of various public records documents filed with the court.

2. Plaintiff's Petition for Alternative Writ of Mandamus (Doc. #300) is **DENIED.** The court has denied similar petitions in the recent past, and plaintiff presents no reason for the court to reconsider its prior orders.

3. Plaintiff's Motion in Limine (Doc. #301) is **GRANTED IN** PART AND **DENIED IN** PART. Evidence of a prior conviction need not be a felony if the offense involved dishonesty or false statement. Fed. R. Evid 609(a) (2). On the other hand, the requirements of Rule 609 must be satisfied.

4. Plaintiff's Motion in Limine (Doc. #302) is GRANTED **IN PART AND DENIED IN** PART. While certainly not every lawsuit filed by plaintiff is relevant to this case, some may be. The Court will decide on specific objections raised to specific exhibits or testimony.

5. Plaintiff's Motion in Limine (Doc. #303) is identical to Doc. #301, and is therefore **DENIED** as moot.

6. Defendant's Motion in Limine (Doc. #308) is GRANTED as to witness Kerry Griner, but is denied as to Jack Morgan and Joe Boggs (as a fact witness, not an expert) . Mr. Morgan was visible on the recorded events which underlie this case and was or could have been known to defendant. The Court assumes that the parties will inform the jury during the presentation of the recordings that the man on the other side of the fence was not defendant Cowart.

7. Plaintiff's Motion in Limine (Doc. #312) is **DENIED** to the extent that neither Scott Whitaker or Marvin Kyser is called as an expert witness. Plaintiff may object to specific testimony at trial.

8. As stated at the February 10, 2006, pretrial conference, the two video recordings listed on page 4 as plaintiff's exhibit 3 are admitted, and the parties shall use the copies previously provided to the court in connection with the summary judgment motions. Plaintiff's proposed exhibits 1, 2, 4, and 5 are inadmissible. Plaintiff's proposed exhibit 6 was withdrawn by plaintiff. On page 4A, plaintiff's exhibits 1, 2, 4, 5, and 7 and not

admissible. As to the additional exhibits on page 4A, exhibits 1, 2, 4, 5, 6, 7, and 8 are not admissible; the court takes the admissibility of exhibit 3 under advisement pending trial. As to the exhibits on page 4B, exhibits 9, 10, and 12 are not admissible; the court takes exhibits 11 and 13 under advisement.

9. As stated at the February 10, 2006, pretrial conference, the admissibility of defendant's exhibits at page 5, exhibits 1 through 6, 9, 13, 14, and 15 are taken under advisement; exhibits 7, 8, 10, 11, 12 are admitted.

10. Plaintiff's oral request to add Joe Boggs to his witness list at page 5 is **GRANTED** to the extent he is added as a fact witness, not an expert witness.

11. Plaintiff will not be allowed to call opposing counsel as witnesses, as he suggests at page 5.

12. Plaintiff will not be allowed to call Dr. Frederick Schaerf or Kerry Griner, as listed on page 6.

13. Plaintiff's objection (page 6) to witnesses Scott Whitaker and Marvin Kyser is overruled to the extent they will be allowed as fact witnesses, not expert witnesses.

DONE AND ORDERED at Fort Myers, Florida, this 14th day of February, 2006.

JOHN E STEELE
United States District Judge

Copies:
Counsel of record
Brian Bevan

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

BRIAN BEVAN,

Plaintiff,

vs. Case No. 2:03-cv-500-FtM-29SPC

MIKE SCOTT, individually and in his official capacity as Sheriff of Lee County, Florida, JOHN MCDOUGALL, individually, KENNETH ERNE, MARK DURLING, HARVEY HUDNALL, FRED BOND, DAVE BONSALL, ROSS DI PASQUALE, SERGEANT HAMILTON, RICHARD TRAVIS COWART, CLAUDIA GADD COWART, JACKIE COWART, SOUTHWEST UTILITY SYSTEMS, INC., CHUCK FUNDERMARK and CHUCK'S WHISKEY CREEK SERVICE, INC.,

Defendant.

ORDER

This matter comes before the Court on plaintiff's Motion for

New Trial (Doc. #330), Motion for a New Trial and Interview of

Juror (Doc. #331), both filed on February 27, 2006, and Motion to

Accept Filing Out of Time (Doc. #338) filed on March 7, 2006.

Additionally, plaintiff filed a Notice of Filing Personal

Information Regarding Jury Foreperson in Accordance with Rule

5.01(d) and in Furtherance of Support of Plaintiff's Prior Motion

to Accept Filing Out of Time (Doc. #339) on March 17, 2006, and

Plaintiff's Additional Request to Interview Juror Foreperson and

the Grant the Plaintiff a New Trial (Doc. #340), filed on

March 20, 2006.

Initially, plaintiff seeks to have the Court accept

his

Memorandum of Law in Support of Plaintiff's Motion for

New Trial

(Doc. #333) as timely filed because it was filed on

February 28,

2006. The motion will be granted to the extent that the Memorandum will be considered in conjunction with the Motion for New Trial (Doc. #330)

Plaintiff seeks a new trial regarding the presentation and admission to the jury of evidence regarding the seizure of the trailer and case law. Having considered the motion, the Court finds no merit. The motion will be denied.

Plaintiff seeks a new trial on the basis that his case was decided by a jury consisting of more than six persons and that one of the alternates was made the Foreperson. The Court assumes, although plaintiff does not provide a basis, that the motion is brought pursuant to Fed. R. Civ. P. 59. Plaintiff cites Florida state cases for the premise that reversible error has occurred.

Although the Florida Rule of Civil Procedure 1.431(g) (1) provides that alternates do not participate in the verdict, the state rules of procedure do not apply in federal court. Under the Federal Rules of Civil Procedure,

> The court shall seat a jury of not fewer than six and not more than twelve members and all jurors

> shall participate in the verdict unless excused from service by the court pursuant to Rule 47 (c) . Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

Fed. R. Civ. P. 48. A 1991 Amendment abolished the institution of the alternate juror so that all the jurors, not *fewer than six,* could participate in the evaluation of the evidence. Fed. R. Civ.

P. 47 advisory committee's note. See also Smith v. Gulf Oil Co., 995 F.2d 638, 644—646 (6th Cir. 1993); Montiel v. City of L.A., 2 F.3d 335, 337 (9th Cir. 1993) . The Court finds no Seventh Amendment issue or violation. Therefore, the motion for a new trial on the basis of the participation of the alternate jurors will be denied.

Additionally, the Court finds that plaintiff has not proffered sufficient evidence of juror misconduct to warrant his request to interview a juror or for the Court to take any action concerning the matter. Therefore, the request to interview the juror will also be denied.

Accordingly, it is now

ORDERED:

1. Plaintiff's Motion for New Trial (Doc. #330) is **DENIED.**

2. Plaintiff's Motion for a New Trial and Motion for Interview of Juror (Doc. #331) are **DENIED.**

3. Plaintiff's Motion to Accept Filing Out of Time (Doc. #338) is GRANTED to the extent that the Memorandum of Law in Support was considered with the Motion for New Trial (Doc. #330)

4. Plaintiff's Additional Request to Interview Juror Foreperson and Motion to Grant the Plaintiff a New Trial (Doc. #340) are **DENIED.**

DONE AND ORDERED at Fort Myers, Florida, this 30th day of

March, 2006.
JOHN E STEELE
United States District Judge

Copies:
Parties of record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

BRIAN BEVAN,

Plaintiff,

vs. Case No. 2:03-cv--500-FtM-29SpC

MIKE SCOTT, individually and in his official capacity as Sheriff of Lee County, Florida, JOHN MCDOUGALL, individually, KENNETH ERNE, MARK DURLING, HARVEY HUDNALL, FRED BOND, DAVE BONSALL, ROSS DI PASQUALE, SERGEANT HAMILTON, RICHARD TRAVIS COWART, CLAUDIA GADD COWART, JACKIE COWART, SOUTHWEST UTILITY SYSTEMS, INC., CHUCK FUNDERMARK and CHUCK'S WHISKEY CREEK SERVICE, INC.,

Defendants.

OPINION AND ORDER

This matter comes before the Court on "Claudia Cowart and Richard T. Cowart's Motion for Costs, Fees and Further Relief" (Doc. #324), filed on February 18,

2006. The motion seeks relief for both Claudia and Richard Cowart, Jackie Cowart and Southwest Utilities Systems, Inc., although not all parties are named in the caption of the motion. Plaintiff Brian Bevan filed a Response (Doc. #326) on February 24, 2006.

I.

On August 29, 2003, plaintiff Brian Bevan initiated this case against the Lee County Sheriff's Department, various deputies, and others, including the Cowarts, seeking damages under 42 U.S.C. §1983. In due course some defendants were dismissed, some were granted summary judgment, some settled, and Richard Cowart went to trial and prevailed.

Defendants have always viewed this lawsuit as mere harassment by the plaintiff. On January 15, 2004, the Court entered an Order (Doc. #85) stating in part that **"[i]f** defendants are correct that the action is simply intended as harassment, there are sanctions and remedies available against both plaintiff and his counsel; if plaintiff is correct that he has a bona fide claim, he is entitled to judgment." (Doc. #85, pp. 3-4) . The Court dismissed

defendant Jackie Cowart the same day by separate order, and Judgment was entered in her favor. (See Doc. #86)

On September 13, 2005, the Court issued an Opinion and Order (Doc. #264) granting Judgment in favor of all defendants as to Count I; in favor of all defendants as to Count II, except as to Richard Travis Cowart as it related to the Fourth Amendment claim for the seizure of the trailer; in favor of all defendants as to Count III, except as to Chuck Fundermark as it related to the Fourth Amended claim for the seizure of the trailer; in favor of all defendants and against plaintiff as to Count IV, except as to Richard Travis Cowart; in favor of all defendants as to Count V; and in favor of all defendants as to Counts VI, VII, and VIII. On September 19, 2005, the Court also entered an Order (Doc. #266) accepting and adopting a Report and Recommendation in the alternative to the ruling granting summary judgment as to the Law

Enforcement Defendants based on plaintiff's failure to comply with the Court's Orders. On December 21, 2005, the Eleventh Circuit Court of Appeals dismissed

plaintiff's interlocutory appeals for lack of jurisdiction. (See Docs. #279-#280)

On February 3, 2006, plaintiff, Chuck Fundermark, and Chuck's Whiskey Creek Service, Inc. filed a Stipulation for voluntary dismissal and these defendants were dismissed. Jury trial commenced February 14, 2006, and the jury rendered a verdict (Doc. #320) in favor of Richard Cowart on February 16, 2006.

II.

Defendants Richard T. Cowart, Jackie Cowart, Claudia Cowart and Southwest Utilities Systems, Inc. seek attorney fees and costs pursuant to 28 U.S.C. § 1927' and 42 U.S.C. § 1983. These defendants also seek injunctive relief precluding plaintiff, Jane Bevan, Lisa Bevan, and Andrew Bevan from any further filings against defendants, witnesses, court personnel, jurors, counsel, and their families, representatives and law firms, absent leave of court. Plaintiff argues that the case is not frivolous, citing Fla. Stat. § 57.105, and that the imposition of the injunction would essentially bar him from seeking recourse in a court of law.

Under 42 U.S.C. § 1988(b), a party prevailing under 42 U.S.C. § 1983 is entitled to "a reasonable attorney's fee as part of the

'The Court assumes that defendant intended to cite 28 U.S.C. § 1927, as the United States Code contains no § 1927 in Title 42.

costs." The Supreme Court, however, has held that in civil rights cases the "plaintiff should not be assessed his opponent's attorney fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christiansburg Garment Co.

v. EEOC, 434 U.S. 412, 422 (1978) . A district court "must focus on the question whether the case is so lacking in arguable merit as to be groundless or without foundation rather than whether the claim was ultimately successful." Sullivan v. School Bd. of Pinellas County, 773 F.2d 1182, 1189 (11th Cir. 1985) (citation omitted) This determination is to be made on a case-by-case basis, and a non-exhaustive list of factors to be considered include: (1) whether plaintiff established a prima facie case; (2) whether defendant offered to settle; and (3) whether trial court dismissed the case prior to trial or held

a trial on the merits. Sullivan, 773 F.2d at 1189 (citations omitted) . See also Cordoba v. Dillard's, Inc., 419 F.3d 1169, 1176-77 (11th Cir. 2005)

A. **Jackie Cowart:**

On January 15, 2004, the Court reviewed the Affidavit of Jackie Cowart, Richard Cowart's wife since 2002, which stated that she was not involved with the 1999 events, was not present for them, and had no personal knowledge of the incidents. Plaintiff did not file an Affidavit to the contrary, and the Court granted summary judgment in her favor. (See Doc. #86) . The Court finds that the case against Jackie Cowart was frivolous, unreasonable, groundless, and without any foundation. Jackie Cowart was a prevailing party by virtue of summary judgment in her favor, and is entitled to attorney's fees under § 1988. The Court will award **$1,563.00** as attorney fees to Jackie Cowart.

B. Southwest Utilities Systems, Inc.:

Summary judgment was entered in favor of Southwest Utilities Systems, Inc. and against plaintiff (Doc. #264), **sO** it qualifies as a prevailing party. The

Court cannot say, however, that the case against it satisfied the heightened standard summarized above. Employees of the company were present at the scene, the company's heavy equipment was used to remove the gate, and the removal facilitated the towing of the trailer. Therefore, the request for attorney fees under § 1988 will be denied as to this defendant. Necessarily, the request for attorney fees under § 1927 and the Court's inherent power will also be denied. Cordoba, 419 F.3d at 1180.

C. **Claudia Cowart:**

In dismissing the case against Claudia Cowart, the Court specifically found that Claudia Cowart was not present at the scene and had no basis for personal liability. (See Doc. #2 64, p. 27)

The Court finds that the claims against Claudia Cowart were frivolous, unreasonable, groundless, and without any foundation. The mere fact that she was previously married to Richard Cowart,

and lived at the property during the time of the relevant events, does not subject her to suit when she was not present at the scene or otherwise involved with the on-

going property disputes. As a result, the Court will grant the request for attorney's fees under § 1988 as to Claudia Cowart. Counsel will be required to separate the amount requested to reflect the appropriate fees for Claudia Cowart only.

D. **Richard Cowart:**

Viewing the evidence in the light most favorable to the non— prevailing party, as the Court must, Johnson v. Florida, 348 F.3d 1334, 1354 (11th Cir. 2003), the Court cannot find that the case was frivolous or without foundation as to Richard Cowart. The Court found sufficient factual disputes to preclude summary judgement and a judgment as a matter of law. The fact that the jury rendered a verdict in Cowart's favor does not mean that plaintiff's case was without foundation. The Court did find plaintiff's "Motion for Recusal of Magistrate Judge Sheri Poister Chappell Together With a Motion Requesting Rescinding and Striking From the Record All of Her Orders and Recommendations" (Doc. #253) patently frivolous, and the Court did grant a Report and Recommendation in the alternative as a sanction. However, there is no basis for the additional sanction of

attorney fees. The Court declines to award fees and expenses to defendant Richard Cowart as a prevailing party under § 1988, or under § 1927, or the Court's inherent power.

III.

Under Fed. R. Civ. p. 54(d), costs "shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. p. 54(d) (1) . While the Court retains discretion to deny costs to a prevailing party, the presumption is in favor of the award of costs, particularly where Congress has provided for the imposition of costs. Arcadian Fertilizer, L.P. v. MPW Indus. Servs. Inc., 249 F.3d 1293, 1296 (11th Cir. 2001) . "[Title 28 U.S.C.] Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d)." Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437,

441-42 (1987) . These are separate from expenses or nonstatutory costs under § 1988, and must be considered separately. See Dowdell

v. City of Apopka, Fla., 698 F.2d 1181, 1189 (11th Cir. 1983); Cappeletti Brothers, Inc. v. Broward County, 754 F. Supp. 197, 198 (S.D. Fla. 1991)

The Court finds that all four prevailing defendants are entitled to costs under 28 U.S.C. § 1920. In order to determine the reasonable costs, defendants must complete and file a Bill of Costs with a supporting memorandum of law. The Court will take this portion of the motion under advisement.

Iv.

Defendants seek an injunction enjoining Brian Bevan, Jane Bevan, Janet Bevan, Lisa Bevan and/or Andrew Bevan from any further filings without leave in any Court against a broad group including counsel and their families and representatives and law firms. The Court declines to impose an injunction with such broad parameters. The Court does not have jurisdiction over the non-party family members of Brian Bevan, much less other courts. As to Mr. Bevan, the Court cannot say that his conduct merits an injunction at this point.

Accordingly, it is now

ORDERED:

1. Claudia Cowart and Richard T. Cowart's Motion for Costs, Fees and Further Relief (Doc. #324) is **GRANTED IN PART** AND **DENIED IN** PART as follows:

a. The motion for attorney fees and expenses is denied as to Southwest Utility Systems, Inc.;

b. The motion for attorney fees is granted as to Jackie Cowart in the amount **$1,563.00;**

c. The motion for attorney fees is granted as to Claudia Cowart, with counsel to submit a breakdown of the fees expended for Claudia Cowart within **TEN (10) DAYS** of this Opinion and Order; and

d. The motion for attorney fees is denied as to Richard Cowart.

2. The motion for injunctive relief is **DENIED** in its entirety.

3. The request for § 1920 costs is **taken under advisement** pending the submission of a Bill of Costs and supporting Memorandum of Law within **TEN (10) DAYS.**

DONE AND ORDERED at Fort Myers, Florida, this 5th day of May, 2006.

JOE N E. STE ELE
United States District Judge

Copies:
Plaintiff
Counsel of record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

BRIAN BEVAN,

Plaintiff,

vs. Case No.
2:03—cv—500-FtM-29SPC

MIKE SCOTT, individually and in his official capacity as Sheriff of Lee County, Florida, JOHN MCDOUGALL, individually, KENNETH ERNE, MARK DURLING, HARVEY HUDNALL, FRED BOND, DAVE BONSALL, ROSS DI PASQUALE, SERGEANT HAMILTON, RICHARD TRAVIS COWART, CLAUDIA GADD COWART, JACKIE COWART, SOUTHWEST UTILITY SYSTEMS, INC., CHUCK FUNDERMARK and CHUCK'S WHISKEY CREEK SERVICE, INC.,

Defendant.

OPINION AND ORDER

_____This matter comes before **the** Court on consideration of the following pending motions: plaintiff's Motion for Reconsideration of Order Granting Attorney Fees to Claudia Cowart (Doc. #349), filed May

11, 2006; defendants' Motion to Alter or Amend May 5 order as it Pertains to Denial of Injunctive Relief (Doc. #353), filed May 17, 2006; defendants' Motion to Strike (Doc. #354), filed May 30, 2006; and plaintiff's Motion to Rescind Order for Attorney Fees (Doc. #356), filed on June 5, 2006.

On May 5, 2006, the Court entered an Opinion and Order (Doc. #348) granting attorney's fees in favor of Jackie Cowart in the amount of $1,563.00 finding that the case was frivolous, unreasonable, groundless, and without any foundation; denying attorney's fees to Southwest Utilities Systems, Inc.; granting attorney's fees in favor of Claudia Cowart finding that the case was frivolous, unreasonable, groundless, and without any foundation; denying attorney's fees to Richard Cowart; and granting taxable costs under 28 U.S.C. § 1920 to all prevailing defendants upon the filing of a Bill of Costs and a supporting memorandum of law. The Court further denied defendants' request for an injunction. Defendant Claudia Cowart was directed to provide a breakdown of fees expended by her separate from other defendants.

I.

Plaintiff seeks reconsideration of the Opinion and Order, arguing that the case against Claudia Cowart was not baseless. More specifically, plaintiff argues that the Lee County Sheriff's Office and District Court's consistent reference to the "Cowarts," and Claudia Cowart's own Affidavit demonstrate her involvement with the seizure and destruction of plaintiff's property.

Liberally construing plaintiff's ***pro se*** motion, the Court will construe the motion as brought under Federal Rule of Civil Procedure 60(b). Rule 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . .; (3) fraud 1; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

As plaintiff does not specify which ground applies, the Court will assume he is requesting relief und the "catchall

provision" of Rule 60(b) (6). See St. Fleur v. City of Ft. Lauderdale, 149 Fed. Appx.849, 852 (11th Cir. 2005) . Reconsideration of a court's previous order is an extraordinary remedy and, thus, is a power which should be used sparingly. Griffin v. Swim-Tech Corp., 722 F.2d 677, 680 (11th Cir. 1984) (citing Ackermann v. United States, 340 U.S. 193, 202 (1950)

Having reviewed the Court's September 13, 2005, Opinion and Order (Doc. #264) and October 18, 2005, Opinion and Order (Doc. #271), the Court finds no cause shown for reconsideration. The Affidavit of Claudia Cowart (Doc. #161-3, ¶ 6) clearly states "I did not personally participate in the removal of the trailer and gate from our property, and was not physically present on August 31, 1999, when the events that are the subject of this action occurred." The Court clearly found that Claudia Cowart presented no basis for personal liability and granted summary judgment in her favor. Plaintiff simply seeks to re-litigate the undisputed facts in this case and reconsideration is not appropriate under such circumstances. "A motion for reconsideration should raise new issues, not merely readdress issues litigated

previously." Painewebber Income Props. Three Ltd. P'ship v. Mobil Oil Corp., 902 F. Supp. 1514, 1521 (M.D. Fla. 1995). The motion will be denied.

II.

Defendants seek to alter or amend the Opinion and Order (Doc. #348), pursuant to Fed. R. Civ. P. 59(e), denying injunction relief. Initially, the Court notes that Federal Rule of Civil Procedure 59(e) does not apply as no judgment has been entered. In the alternative, the Court will construe the motion as brought under Federal Rule of Civil Procedure 60(b) as defendants essentially seek reconsideration on the basis of newly discovered evidence and/or any other basis justifying relief.

Defendants cite **FLA. STAT.** § 68.093 (2005), also known as Florida Vexatious Litigant Law, arguing that this case is the fifth case against defendants justifying the imposition of an injunction barring future litigation. Florida's Vexatious Litigant Law provides that a "vexatious litigant" is any person "who, in the immediately preceding 5- year period, has commenced, prosecuted, or maintained, pro se, five or more civil

actions in any court in this state . . . which actions have been finally and adversely determined against such person or entity . . . ." **FLA. STAT.** § 68.093 (2) (d) . Even assuming that the Florida Statute may be first applied by a federal court, the statute ***clearly*** states that an action is ***"not*** deemed to be "finally and adversely determined" if an appeal in that action is pending." Fla. Stat. 68.093(2) (d) Plaintiff filed a Notice of Appeal (Doc. #341) to the Eleventh Circuit Court of Appeals on March 20, 2006, from the final judgment, which remains pending. Therefore, the motion will be denied on this basis.

III.

Defendant Claudia Cowart seeks to strike plaintiff's motion for reconsideration. The Court did not consider any of the attached exhibits as plaintiff failed to demonstrate a reasonable basis for reconsideration. The Court denied the motion for reconsideration above, therefore the motion will be denied as moot and the request for attorney's fees related to the filing of this motion will be denied.

Iv.

Plaintiff seeks to "rescind" the Order for attorney's fees alleging fraud by counsel for defendants on the basis that the fees include billable hours related to the state court actions. The Court has determined that the award is appropriate, however, the actual amount has yet to be determined. To the extent that plaintiff is alleging double-billing, the objection is so noted. The motion is otherwise denied as there is no evidence supporting the allegation that counsel has double-billed and collected twice for work performed.

V.

Defendant Claudia Cowart filed a Breakdown of Fees Expended for Claudia Cowart (Doc. #351), in response to the Court's Opinion and Order (Doc. #348), indicating a total of $48,042.00 out of the $72,000.00 sought for Claudia and Richard Cowart collectively. Specifically, counsel eliminated the hours attributable to Richard Cowart only. The remaining amount represents work that would have been completed regardless of Richard Cowart's presence because Claudia's defense

presented many of the same issues and basis for research. Upon review, the Court will award the amount requested in favor of Claudia Cowart.

VI.

Also in response to the Court's Opinion and Order (Doc. #348), defendants have filed a Bill of Costs (Doc. #350) and Affidavit of Proof of Indebtedness and Costs (Doc. #352) . Defendants seek $555.74 in taxable costs pursuant to 28 U.S.C. § 1920. Although the Court finds that defendants are prevailing parties and entitled to costs, the Court will review the amounts to determine whether they were reasonable.

Under Fed. R. Civ. P. 54(d), costs "shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d) (1) . Expenses or nonstatutory costs are separate from statutory costs and must be considered with a request for fees. See Dowdell v. City of Apopka, Fla., 698 F.2d 1181, 1189(11th Cir. 1983) . Therefore, at the onset, the

Court will eliminate the request for the oversized exhibit $114.48 and $14.56 as overhead expenses.

The remaining amount requested includes copying costs; court reporter costs; service costs; and witness fees. Under Section 1920, the following costs are taxable:

> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

Under 28 U.S.C. § 1920(4), only costs for "copies of papers necessarily obtained for use in the case" may be taxed. The Court finds that the $60.00 for copies were necessary to the case. "Charges for extra copies and for documents prepared for convenience, preparation, research, or for the records of counsel are not taxable." Mans Distrib. Co. v. Anheuser—Busch, Inc., 2001 WL 862642, *5 (M.D. Fla. 2001) (citing Goodwall Constr. Co. v. Beers, 824 F. Supp. 1044, 1065 (N.D. Ga. 1992)). The request for $24.70, the transcript of the pretrial conference, will be eliminated under this premise.

Costs incurred as a result of private process servers may be taxed under 28 U.S.C. § 1920(1), so long as the amount does not exceed the statutory limit. United States EEOC v. W&O, Inc., 213 F.3d 600, 624 (11th Cir. 2000). Under 28 C.F.R. § 0.114 (a) (3), the United States Marshal charges $45.00 per hour for each item served personally plus travel and out-of-pocket expenses. Therefore, the request for $82.00 will be permitted.

Under 28 U.S.C. § 1821(b), a witness attending court or a deposition shall be paid a $40.00 attendance fee plus travel expenses. This $40.00 is a maximum amount per witness, including expert witnesses. Morrison v. Reichhold Chems., Inc., 97 F.3d 460, 463 (11th Cir. 1996); Cronin v. Washington Nat'l Ins. Co., 980 F.2d 663, 672 (11th Cir. 1993) . The witnesses were paid for attendance, parking, and mileage. Therefore, the costs will be allowed.

Accordingly, it is now

ORDERED:

1. Plaintiff's Motion for Reconsideration of Order Granting Attorney Fees to Claudia Cowart (Doc. #349) is **DENIED.**

2. Defendants' Motion to Alter or Amend May 5 order as it Pertains to Denial of Injunctive Relief (Doc. #353) is **DENIED.**

3. Defendant Claudia Cowart's Motion to Strike (Doc. #354) is **DENIED** and the request for fees and an injunction are also **DENIED.**

4. Plaintiff's Motion to Rescind Order for Attorney Fees (Doc. #356) is **DENIED.**

5. The previously granted motion for attorneys fees as to Claudia Cowart is granted in the amount of **$48,042.00.**

6. Plaintiff is taxed $ **402.00** for taxable costs in favor of defendants Richard T. Cowart, Jackie Cowart, Claudia Cowart, and Southwest Utilities Systems, Inc.

7. The Clerk shall enter an Amended Judgment to include:

a. Attorney fees in favor of Jackie Cowart in the amount of $1,563.00;

b. Attorney fees in favor of Claudia Cowart in the amount of $48,042.00; and

c. Taxable costs against plaintiff and in favor of defendants Richard T. Cowart, Jackie Cowart, Claudia Cowart, and Southwest Utilities Systems, Inc. in the amount of $402.00.

8. The Clerk shall forward a copy of this Opinion and Order to the Eleventh Circuit Court of Appeals forthwith as a pending Notice of Appeal was filed from the May 5, 2006, Opinion and Order (Doc. #348)

DONE AND ORDERED at Fort Myers, Florida, this 9th day of August, 2006.

JOHN E STEEL
United States District Judge

Copies:
USCA
Parties of record